Supreme Court, U.S.
FILED

091327 APR 26 2010

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No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

MARK ANTHONY GILL,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri
– Capital Case –

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Does a defendant's constitutional right to effective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), require capital-defense counsel to conduct a pre-trial investigation into evidence that disparages the murder victim's character, even though such character evidence is presumptively inadmissible under state law?

PARTIES TO THE PROCEEDING

The petitioner, State of Missouri, was the respondent below. The respondent, Mark Gill, was the appellant.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court reversing the motion court's judgment and sentence, filed December 1, 2009, and reported at 300 S.W.3d 225 (Mo. banc 2009), is reprinted in the Appendix ("App.") at A2-A18. The order denying petitioner's motion for rehearing is unreported. It is reprinted in the Appendix at A1.

JURISDICTION

The Missouri Supreme Court entered its judgment on December 1, 2009. The Court denied petitioner's motion for rehearing on January 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This petition asks the Court to clarify whether a defendant's constitutional right to effective assistance of counsel requires capital-defense counsel to seek out and develop evidence to disparage the murder victim's character, even though such evidence is presumptively inadmissible under state law.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court enunciated a two-part test for evaluating a defendant's claim that he received constitutionally inadequate representation. *Id.* at 686-87. First, the defendant must show that counsel's performance was deficient—that is, that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, the defendant must show that he was prejudiced by counsel's deficient performance. *Id.*

The Court stressed that the reasonableness of counsel's representation must be judged on the facts of the particular case, "viewed as of the time of counsel's conduct." *Id.* at 689-90. To fairly evaluate an attorney's performance, the Court explained, the reviewing court must make every effort "to eliminate the distorting effects of hindsight." *Id.* at 689.

Despite this Court's clear instruction that an attorney's performance must be evaluated from counsel's perspective at the time, the Missouri Supreme Court found that respondent's counsel was ineffective for failing to investigate and discover evidence relating to the victim's character that, although presumptively inadmissible, would have been valuable in hindsight because the State put the victim's character at issue during the penalty phase

at trial. *See* App. at A14-A16. Had the Missouri Supreme Court identified the correct constitutional standard—that counsel's performance must be measured from counsel's perspective at the time the challenged decisions were made—the Court would have had to conclude that counsel acted reasonably in deciding not to spend time looking for inadmissible evidence pertaining to the victim's character.

Respondent was convicted of first-degree murder for killing an acquaintance with whom he had been staying. *See State v. Gill*, 167 S.W.3d 184, 187-88 (Mo. banc 2005). After respondent discovered that the victim had a large amount of money in his bank account, he and an accomplice kidnapped the victim, forced him to turn over his ATM card and PIN, pushed the victim into a makeshift grave, and then shot him in the head. *Id.* When respondent was arrested, he had the victim's computer with him. He and his accomplice had used the computer to access funds from the victim's bank account.

Prior to trial, the State made the computer available to defense counsel for inspection. Defense counsel asked the prosecutor whether there was anything important to the case on the computer; the prosecutor said that there was not. Defense counsel also examined the State's report listing the names of the files on the computer, some of which were suggestive of sexually explicit content. Because respondent had never said anything to his attorneys about seeing pornography on the victim's computer, respondent's counsel did not believe that the pornography was relevant to respondent's case. App. at A19-A20. Thus, counsel decided not to spend time

examining the files on the victim's computer. App. at A19-A20.

Instead, counsel focused their investigation on respondent's background and mental health. Their investigator spoke with respondent's family members, interviewed respondent's former teachers and coaches, and collected respondent's medical, school, military, employment, and prison records. Counsel also retained an expert to evaluate the impact of respondent's difficult childhood on his development and decision-making capabilities. During the penalty phase of respondent's trial, respondent's counsel presented thirteen witnesses, including respondent's family, friends, and an expert in human development to describe how respondent's upbringing influenced his personality as an adult.

The State offered victim-impact testimony from several of the victim's relatives. App. at A14. Respondent's counsel objected, but the objection was overruled. App. at A14. Portions of the victim-impact testimony reflected well on the victim's character—for example, the victim's siblings testified that the victim was generous with his money. App. at A14.

After his trial was over, respondent discovered that the victim's computer contained sexually explicit "chat" transcripts and images depicting child pornography and bestiality. App. at A7-A9. Respondent filed a motion for post-conviction relief with the circuit court pursuant to Missouri Court Rule 29.15. App. at A2. He alleged, *inter alia*, that his trial counsel's decision not to investigate the contents of the victim's computer was objectively unreasonable. App. at A11. Respondent claimed that if counsel had discovered the sexually explicit

material on the victim's computer, counsel could have used the evidence in the penalty phase to rebut the State's characterization of the victim as a "saint" or to dissuade the State from using character evidence altogether. App. at A11.

The post-conviction court rejected respondent's claim of ineffective assistance of counsel. Citing *Strickland*, the court recognized that counsel's conduct was to be evaluated from counsel's perspective at the time. The court did not believe that reasonable counsel, in preparing for respondent's murder trial, would have felt it necessary to examine the victim's computer in search of illegal pornography with which to attack the victim's character. The court explained that "reverse victim impact" evidence—offered by the defendant to impugn the victim's character—would not have been admissible at the trial. Further, the court believed that neither respondent's counsel nor any reasonable attorney would have used the computer's contents to attack the victim's character even if it had been admissible. The court agreed with respondent's counsel's observation that it is generally bad strategy to "kick the [victim's] corpse," and found that counsel would have refrained from doing so to avoid alienating the jury. Thus, the motion court concluded that victim-character evidence such as the pornography on the victim's computer was of "such tenuous value that it is not reasonable to require an attorney to make such a search."

On appeal, the Missouri Supreme Court reversed. App. at A11-A17. The Court acknowledged that, under Missouri law, character evidence about the victim is generally inadmissible. App. at A13. But the Court found that because the State introduced victim-impact testimony that reflected well on the

victim, respondent was free to rebut that testimony with whatever evidence he could find to impugn the victim's character. *See* App. at A13-A14. Because, in this case, the State had "opened the door" to victim-character evidence, the Missouri Supreme Court believed that respondent's counsel was ineffective for failing to locate any damaging evidence about the victim's character prior to trial. *See* App. at A14-A17. The Court concluded that a reasonably competent attorney would have examined the contents of the victim's computer, discovered the child pornography, bestiality content, and sexually explicit chat transcripts thereon, and presented the evidence in rebuttal at the penalty phase. App. at A14-A17. The Court believed that if the jury had had "a different description of the victim" based on the explicit content on the victim's computer, there was a reasonable probability that the jury would have decided that respondent did not deserve the death penalty for the victim's murder. App. at A16-A17. Therefore, the Court vacated respondent's sentence and ordered a new penalty phase. App. at A17-A18.

REASONS FOR GRANTING THE PETITION

I. In analyzing whether defense counsel's failing to discover presumptively inadmissible pornographic files on the murder victim's computer was constitutionally deficient, the Missouri Court misstated the law set forth in *Strickland*, in that the Court ignored the requirement that the reasonableness of counsel's conduct must be evaluated from counsel's perspective at the time.

In *Strickland v. Washington*, the Court emphasized that when performance by defense counsel is challenged as deficient, counsel's conduct must be reviewed in light of counsel's perspective as it would have been at the time the purportedly unreasonable decisions were made. *See* 466 U.S. 668, 687-91 (1984). The Court expressly cautioned against relying on hindsight to evaluate whether an act or omission of counsel was objectively unreasonable:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689. The elimination of hindsight bias is a fundamental component of the law governing ineffective-assistance challenges. As this Court has explained, "in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987)

(quoting *United States v. Cronic*, 466 U.S. 648, 665 n. 38 (1984)). And "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003).

In respondent's case, the Missouri Supreme Court ignored this Court's clear instruction that attorney performance must be evaluated independent of the "distorting effects of hindsight." In its recitation of the *Strickland* test, the Missouri Supreme Court correctly observed that counsel's performance is "deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms." App. at A12. And the Court acknowledged the strong presumption that counsel's conduct was reasonable and effective—a presumption that is overcome only if the defendant shows that specific acts or omissions, in light of all the circumstances, fell outside the wide range of professional, competent assistance. App. at A12. But the Missouri Supreme Court omitted the requirement that its review of counsel's performance must relate to counsel's perspective at the time. *See* App. at A12. By ignoring this critical component of the *Strickland* test, the Missouri Supreme Court misstated the law.

The Court held that respondent's counsel's performance was deficient because counsel failed to discover sexually explicit material on the murder victim's computer. App. at A14-A16. According to the Court, counsel should have thoroughly examined the contents of the computer after receiving the report signaling that pornography was stored thereon. App. at A14-A15. The Court also criticized counsel for declining to interview the police detective who had

examined the computer. App. at A15. If counsel had conducted this additional investigation, the Court reasoned, they would have been prepared to rebut the State's character evidence regarding the victim's good character. App. at A15-A16.

But the Missouri Supreme Court's reasoning is faulty because it depends on hindsight—the Court found counsel's decision not to investigate the pornographic content on the victim's computer unreasonable only because, as it turned out, the evidence could have been used in rebuttal after the State managed to introduce presumptively inadmissible victim-character evidence over counsel's objection. At the time respondent's counsel decided not to examine the computer, they had no reason to believe that it contained relevant information, nor did they have reason to suspect that pornographic materials from the victim's computer would be admissible at trial to smear the victim's character. This Court has recognized that defense counsel's decision not to pursue a particular line of investigation is reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Burger*, 483 U.S. at 794.

Nothing in defense counsel's pre-trial investigation suggested that the victim's computer would contain information relevant to respondent's case. Respondent had already confessed to the murders and admitted that his motive was to steal the victim's money. He never told counsel (or anyone else) that he had seen pornography on the victim's computer or that he suspected that the victim was a pedophile. Although the State made the computer available for inspection during discovery, the prosecutor told defense counsel that there was

nothing important to the case on the computer. The State also gave defense counsel a report cataloguing the files from the computer, which counsel reviewed. Respondent's counsel recognized that some of the file names suggested sexually provocative content, but noted that nothing in the report clearly indicated child pornography or obscenity. And, as counsel testified at the post-conviction evidentiary hearing, the possibility that the victim had pornography on his computer simply was not something they would be concerned about in preparing for respondent's murder case. App. at A19-A20.

Counsel's decision not to seek out information relating to the victim's character was consistent with prevailing professional norms. This Court has long recognized that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable." *Padilla v. Kentucky*, 559 U.S. ___, ___ (2010) (slip op., at 9). Indeed, the "norms" reflected in these guides are likely more stringent than the minimum level of professional competence needed to satisfy the Sixth Amendment, as "the standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice." *Padilla*, 559 U.S., at ___ (Alito, J., concurring in judgment, slip op. at 3). But even the most thorough and demanding standards detailing the responsibilities of capital-defense counsel do not recommend that counsel search the victim's background for evidence that may be used to smear the victim's character during penalty phase. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, §10.7 (2003). Respondent's counsel's decision to spend their time developing other mitigating evidence was wholly

consistent with the practice and expectations of the legal community.

And more importantly, counsel's disinterest in whether the victim collected pornography on his computer was reasonable in light of Missouri law that makes evidence of a murder victim's character presumptively inadmissible. As the Missouri Court acknowledged in its opinion in this case, "[g]enerally, neither the State nor the defense may introduce character evidence about the victim in a murder case." App. at A13. If the State attempts to introduce evidence of the victim's good character during the penalty phase, defense counsel may either object to the introduction of the evidence or may allow the State to present the evidence and rebut it with negative character evidence. App. at A13-A14. The pornography on the victim's computer, relevant only insofar as it reflected badly on the victim's character, would thus have been presumptively inadmissible at respondent's trial. Defense counsel objected when the State attempted to present evidence of the victim's good character, but the objection was overruled. App. at A14. Defense counsel cannot be criticized for failing to predict that otherwise inadmissible evidence would become admissible rebuttal evidence at trial because the State, over counsel's valid objection, would be permitted to introduce evidence of the victim's good character.

But the Missouri Supreme Court found counsel's performance unreasonable precisely because counsel failed to make such a prediction. The Court held that respondent's counsel should have presented rebuttal evidence when the State introduced evidence regarding the victim's good character, and that counsel was unable to do so because they had failed to discover

the evidence on the victim's computer. App. at A14-A16. The Court's condemnation of counsel's decision not to investigate the pornography on the computer depends on the premise that the pornography was relevant and admissible at trial—a fact that became true only after the prosecutor put the victim's character at issue during the penalty phase, long after counsel's pre-trial investigation was complete. By relying on hindsight to judge counsel's performance, the Missouri Supreme Court effectively imposed a new constitutional requirement on defense counsel—that they must investigate and discover all evidence, even presumptively inadmissible evidence, if in the future the State may open the door to its admissibility. This Court should grant the petition to clarify whether the Constitution requires defense counsel to investigate not only relevant, admissible evidence, but also evidence that, at the time counsel is conducting its investigation, is presumptively inadmissible.

II. By relying on hindsight to conclude that respondent's counsel were ineffective, the Missouri Supreme Court effectively created a *per se* rule requiring capital-defense counsel to investigate evidence pertaining to a murder victim's background and character. Such a rule threatens to overburden counsel and to subject the families and friends of murder victims to painful and humiliating inquiries by the defense.

Since *Strickland* was decided, this Court has provided additional guidance regarding the minimum investigation that capital-defense counsel must conduct to have provided reasonably competent

assistance. For example, counsel is required to investigate the defendant's background in an effort to discover potential mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (holding that counsel performed deficiently because they failed to conduct an investigation that would have uncovered evidence of the defendant's "nightmarish childhood"); *see also Wiggins v. Smith*, 539 U.S. 510, 523-26 (2003) (concluding that counsel's representation was ineffective because they had limited their investigation to the defendant's presentencing investigation and social-services records even though the records revealed information suggesting that a more thorough investigation would be productive). Counsel must also examine the evidence that the State intends to use against the defendant at trial. *See Rompilla v. Beard*, 545 U.S. 374, 383-90 (2005) (holding that counsel acted unreasonably in failing to examine the State's file pertaining to one of the defendant's prior convictions when counsel knew that the State intended to use the prior conviction to prove an aggravating factor to support a death sentence).

These minimal standards notwithstanding, this Court has explicitly cautioned against the imposition of *per se* rules governing counsel's representation. In *Strickland*, the Court explained that a defendant complaining that his attorney was ineffective must show that the attorney's representation fell below an objective standard of reasonableness, adding that "[m]ore specific guidelines are not appropriate." 466 U.S. at 687-88. Indeed, the Court suggested that rigid requirements might themselves be unconstitutional, observing that "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude

counsel must have in making tactical decisions." *Id.* at 689.

Further, the creation of *per se* rules requiring counsel to take particular investigative steps in every case may actually reduce the effectiveness of counsel overall. As Justice Kennedy observed in his dissenting opinion in *Rompilla*, "[t]he existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." 545 U.S. at 400 (Kennedy, J., dissenting). Rigid investigative requirements may also divert resources from other, more fruitful pursuits. *See id.* at 408 ("This rigid requirement [that defense counsel must examine every document in the defendant's prior conviction files] would divert counsel's limited time and energy away from more important tasks."). Each new requirement imposed upon capital defense attorneys "risks distracting attorneys from the real objective of providing vigorous advocacy as dictated by the facts and circumstances in the particular case." *Id.* at 402.

By holding that respondent's defense counsel provided ineffective assistance for choosing not to search the contents of the victim's computer for evidence that would reflect badly on the victim's character, even though the evidence would be admissible only if the State introduced evidence of the victim's good character, the Missouri Supreme Court effectively created a new *per se* rule governing capital-defense counsel's pretrial investigation. In light of the Court's decision, capital-defense counsel must now investigate the murder victim's background and character so that they will be prepared for rebuttal if the State introduces evidence of the victim's good character. It is no longer enough

for defense counsel to investigate and develop mitigation evidence from which counsel can argue that the defendant deserves to live; counsel must now also develop evidence with which they can suggest that the victim deserved to die.

Under the Missouri Supreme Court's new rule, counsel must investigate victim-character evidence even though such evidence will seldom be useful, even if it is admissible as rebuttal to victim-impact evidence. Often, defense counsel will want to avoid attacking the victim's character for strategic reasons. In the case at bar, respondent's counsel described the tactic as 'kicking the corpse," and testified, "[i]n penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries." App. at A19. Respondent's counsel opted for a different strategy, deciding to object (albeit unsuccessfully) to the admission of the State's positive character evidence. The post-conviction motion court concluded that counsel's strategy was reasonable, finding that no reasonable attorney would have seriously considered using the evidence on the computer to disparage the victim at trial, given the risks inherent in vilifying a murder victim. Nevertheless, the Missouri Supreme Court concluded that reasonably competent defense counsel would have investigated and discovered the pornography on the computer and, when the State introduced evidence of the victim's good character, would have used the pornography evidence in rebuttal. App. at A14-A17.

Thus far, it appears that the Missouri Supreme Court stands alone in declaring that capital-defense attorneys are obligated by the Constitution to search a victim's background for evidence that may later be

used to suggest that the victim's life had little value. But now that Missouri has announced that the "smear-the-victim" strategy is constitutionally mandated in cases where the State adduces victim-impact evidence, some capital-defense attorneys in other states will surely adopt the strategy in their own cases. National media reports highlighted the Missouri Supreme Court's holding that defense counsel should have attacked the victim's character with evidence that he was interested in illicit pornography. *See Court Overturns Death Sentence, Saying Defense Erred*, N.Y. TIMES, Dec. 2, 2009, at A20, available at http://www.nytimes.com/2009/12/02/us/02missouri.html (Last accessed Apr. 15, 2010); Editorial, *Victims' rights works both ways*, L.A. TIMES, Dec. 7, 2009, available at http://articles.latimes.com/2009/dec/07/opinion/la-ed-victims7-2009dec07 (Last accessed Apr. 15, 2010). As one California forensic psychologist noted in a blog entry shortly after the Missouri Supreme Court's decision issued, defense attorneys handling even "garden-variety" cases may be well-advised to search for evidence of a victim's sexual perversions so that they will be prepared to use the evidence at trial. *See* Karen Franklin, *Kiddie Porn: Risky to Ignore* (Dec. 6, 2009), http://forensicpsychologist.blogspot.com/2009/12/kiddie-porn-risky-to-ignore.html (Last accessed Apr. 15, 2010). If reporters and forensic psychologists across the country are cognizant of the effect that the Missouri decision may have on capital litigation, seasoned capital-defense attorneys in every jurisdiction are certainly also considering its implications. Capital counsel may now feel compelled to conduct their own investigations into victims' backgrounds in an effort to satisfy what they anticipate will be a new constitutional requirement for minimally effective representation.

Even though the Missouri Supreme Court is the first to declare that the Constitution requires capital defense counsel to seek out evidence to disparage a murder victim's character, the harm from the Court's decision will be ubiquitous and immediate. Capital-defense counsel nationwide are conducting their investigations in preparation for capital-murder trials and post-conviction proceedings. In light of the Missouri Supreme Court's decision, cautious counsel, in an effort to comply with minimal standards of effectiveness, will dig into their victims' backgrounds in search of evidence that might be used later in rebuttal if positive character evidence is presented by the State. This new standard in capital-case investigation will rarely help defendants, but will have a devastating effect on the victim's family and friends, who will be harangued by zealous investigators. In crafting a rule that requires capital-defense counsel to drag murder victims through the mud, the Missouri Supreme Court forgot this Court's admonition that "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 15 (1983). The brutal murder of a loved one is torture enough for the surviving friends and relatives. Surely the Constitution does not require defense attorneys to exacerbate the survivors' pain by unearthing the most embarrassing personal details of the victim's life—especially because the evidence discovered during such an investigation will in most cases be inadmissible at trial.

The Missouri Supreme Court's rigid requirement that defense counsel must search the victim's background for disparaging character evidence is inconsistent with this Court's direction that specific,

detailed rules are inappropriate for evaluating whether counsel has provided constitutionally adequate representation. *See Strickland*, 466 U.S. at 687-89. The new rule will inevitably divert counsel's time and energy from worthier tasks and may ultimately result in less effective representation. In addition, the rule will often force defense counsel and their investigators to interrogate a murder victim's friends and relatives regarding the victim's character flaws—an exercise that is sure to needlessly inflict pain upon the survivors. This Court should grant the petition to make clear that the Constitution does not require that counsel expend their scarce resources searching for presumptively inadmissible evidence pertaining to the victim's character.

III. The Missouri Supreme Court's conclusion that defense counsel were ineffective for failing to investigate and discover the presumptively inadmissible character evidence on the victim's computer conflicts with cases in other jurisdictions stating that defense counsel will not be considered ineffective for failing to investigate and discover inadmissible evidence.

Although no jurisdiction outside of Missouri has squarely addressed whether capital-defense counsel is constitutionally obligated to search for evidence reflecting badly on the murder victim's character, other courts have held that counsel will not be deemed ineffective for failing to investigate inadmissible evidence. *See DeSchon v. State*, 197 P.3d 476 (Mont. 2008); *Cummings v. Sirmons*, 506 F.3d 1211 (10th Cir. 2007). The Missouri Supreme Court's holding in respondent's case is contrary to

the general rule recognized in *DeSchon* and *Cummings*. The Court should grant the petition to resolve the conflict.

In *DeSchon*, the Montana Supreme Court addressed whether the defendant's trial counsel provided ineffective assistance because he did not adequately investigate or present evidence that the victim had a propensity for violence. 197 P.3d at 478. Specifically, the defendant complained that his attorneys failed to speak with members of his family, who would have testified as to specific instances where the victim acted violently. *Id.* at 481. This evidence, the defendant argued, would have been relevant to support his "justifiable use of force" defense. *Id.* Defense counsel testified that they did not speak to the defendant's family about the victim's violent tendencies because, as they understood the law, evidence pertaining to the victim's violent past was admissible only to the extent that the defendant knew about it. *Id.* at 479, 481. The Montana Supreme Court noted that the defendant's attorneys' understanding of the law was correct—the undiscovered evidence of the victim's violent character was not admissible because the defendant knew nothing about it. *Id.* at 481. The Court concluded that the defendant's counsel "were not ineffective because they did not investigate and attempt to adduce inadmissible testimony." *Id.* at 481-82.

The Tenth Circuit Court of Appeals reached a similar conclusion in *Cummings*. *See* 506 F.3d at 1232-33. In an application for post-conviction relief, the defendant in Cummings argued that his trial attorneys had been ineffective in failing to investigate, discover, and use evidence of a state

witness's mental health history to impeach the witness's trial testimony. *Id.* at 1232. The Court of Appeals rejected the defendant's argument, noting that "it is far from clear that evidence of [the witness's] purported mental health history would have been admissible for purposes of cross-examination . . . ." *Id.* at 1233. For that reason, among others, the Court of Appeals concluded that the defendant had failed to satisfy either of the *Strickland* prongs. *Id.*

The Missouri Supreme Court's condemnation of respondent's counsel for failing to investigate, discover, and use presumptively inadmissible evidence conflicts with the decisions in *DeSchon* and *Cummings* recognizing that such investigation is not constitutionally required. This divergence among the lower courts' interpretation of the constitutional standard for minimally effective representation requires this Court's attention.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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January 26, 2010

Mr. James B. Farnsworth
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P.O. Box 899
Jefferson City, MO 65102

In Re: Mark Anthony Gill, Appellant, vs. State of Missouri, Respondent
Missouri Supreme Court No. SC89831

Dear Mr. Farnsworth,

Please be advised the Court issued the following order on this date in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON
s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en banc

cc:
Mr. William J. Swift

300 S.W.3d 225

SUPREME COURT OF MISSOURI
EN BANC

MARK GILL,
Appellant,

v.

STATE OF MISSOURI
Respondent.

No. SC89831

December 1, 2009
Rehearing Denied January 26, 2010.

Mary R. Russell, Judge.

Mark Gill was convicted of first-degree murder by a New Madrid County jury.[1] The jury recommended the death penalty, and the trial court agreed, sentencing Gill to death. This Court affirmed the conviction in *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005). Gill sought post-conviction relief by a Rule 29.15 motion, claiming prosecutorial misconduct and ineffective assistance of counsel. The motion court issued an order denying each of his claims. He appeals. Because the death penalty was imposed, this Court has jurisdiction of the appeal. Mo. Const. art. V, sec. 10; Order of June 16, 1988.

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[1] Along with first-degree murder, Gill was also convicted of armed criminal action, kidnapping, first-degree robbery, and first-degree tampering.

Among the issues in this case is whether Gill's counsel provided ineffective assistance of counsel by failing to review carefully the directory of the victim's computer, which contained child pornography, or by not interviewing or deposing the investigator who prepared the directory.

Although a victim's character is not typically an issue, when the State introduced evidence of the victim's good character in the penalty phase, Gill's counsel should have rebutted the State's good character evidence with the sexually explicit contents of the victim's computer. Because his counsel failed to discover the sexually explicit contents of the victim's computer, Gill's counsel were ineffective. This Court affirms the denial of the Rule 29.15 motion as to the guilt phase of the trial, but reverses the denial of the motion as to the penalty phase insofar as Gill had ineffective assistance of counsel for failing to investigate the victim's computer. The case is remanded.

I. Facts

A. Preparation for Trial

Defense counsel David Kenyon and Sharon Turlington did the majority of Gill's trial preparation, including reviewing the documents provided in discovery. Among the documents received were several reports authored by Lt. David James of the Cape Girardeau County Sheriff's Department. Lt. James prepared the probable cause statement, which stated that "[Gill] had [the victim's] computer in the car with him at the time of his arrest." Lt. James's name also appeared on several police reports as the supervisor giving other

officers investigative assignments. In addition, the State included Lt. James as a witness in the second amended information.

In addition to his work as the officer in charge of the investigation, Lt. James prepared a report, which was a listing of all the file folders or directories on the victim's computer.[2] Approximately a month prior to trial, the prosecutor sent defense counsel a copy of the report for their review.

The report included a list of instant message accounts and a list of the users with whom the accounts exchanged messages. User name "dogday_afternoon2002" exchanged messages with 16 other users: (1) "a_slutty18girl_w38c," (2) "blackstamina69," (3) "cherie_012," (4) "daddoesme15," (5) "elena_ita_girl," (6) "jbnrbi," (7) "jenny_cappa," (8) "kellieann1980," (9) "kelly1_15_1999," (10) "lilnichole14," (11) "lobowolf1960," (12) "msdiane69," (13) "sweet_tasting_slute," (14) "sweetgirl4older," (15) "sweetpiece123," and (16) "tiffyfreemont11."

Defense counsel reviewed the report prior to trial but did not notice anything that would have alerted them to the presence of pornography on the computer. In addition to reviewing the report, Gill's counsel spoke with the prosecutor about the computer's contents. Their discussions with the prosecutor focused on whether the computer

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[2] The victim's computer was relevant to the investigation and prosecution of the crime because, after the murder, Gill and his co-defendant, Justin Brown, used the computer to transfer $55,000 from one of the victim's accounts to an ATM-accessible account so that they could access the money.

contained (1) anything possibly incriminating and (2) any e-mails that implicated another potential defendant. The prosecutor assured defense counsel that there was nothing on the computer that he planned to use in the case or that implicated another potential defendant. Relying on the prosecutor's assertions, defense counsel decided to focus their attention away from the computer's contents.

B. Evidence About Victim Presented at Penalty Phase

The prosecutor presented five witnesses during the penalty phase of Gill's trial. Sgt. Eric Friedrich testified as to Gill's prior convictions. The other four witnesses, all relatives of the victim, testified as to how the victim's death affected their lives and to the victim's good character.

First, the victim's sister identified a family photograph album chronicling the victim's life. She also read her prepared impact statement to the jury and spoke about the victim's role in her life, including defending her against other children. She stated how proud the victim was of his daughter when she was born. She said that the image of him cradling his daughter when she was an infant reminded her of a "Mr. Mom." Additionally, she spoke about the victim's generosity with his money.

Second, the victim's brother-in-law testified about his relationship with the victim. The first day they met, the victim helped him push his car to a gas station. When he and his wife wanted to marry, the victim reassured their uneasy family about the couple's decision. The brother-in-law testified that he and the victim studied "the West, the mythical West,

and the true West, for years and years," including the characters who taught valuable life lessons, such as "[y]ou don't cheat at cards" and "you don't start any trouble, but you stand up to it when it comes."

Third, the victim's brother read a prepared statement to the jury. He recalled their childhood relationship and how the victim had helped him throughout their adolescent years. As adults, they kept in touch. During one visit, the brother learned that the victim was having serious financial problems because he had been generous with his money, including lending a friend money to pay for his wife's funeral. The brother concluded his statement by paraphrasing Abraham Lincoln's Gettysburg Address: "The world will little note, or long remember what we say here. But they will never forget what we did here." He said that this paraphrase described his memories of the victim.

Fourth, the victim's 17-year-old daughter testified. She told the jury of the impact of her father's death. She indicated that she stays awake at night thinking about how he was murdered. When asked about how her life will be different now that her father was murdered, she replied, "Some day I'm gonna graduate college, and he's not gonna be there to tell me how proud he is of me. And some day I'll get married, and I won't have my dad to walk me down the aisle and tell me how proud he is of me."

C. Post-Penalty Evidence

Lt. James testified at the Rule 29.15 hearing that he knew there was pornography on the computer within a few days of creating the report. Before Gill's trial, he looked at the transcript of the instant

message conversation about the 17-year-old daughter. Yet Gill's counsel testified that they chose not to interview or depose Lt. James. Defense counsel testified that while Lt. James was the officer in charge, they chose not to interview or depose him because he did not conduct the investigation himself and would be of little use at trial because his testimony would be hearsay.

Lt. James never told the prosecutor about the instant message conversation prior to Gill's trial because he did not think it was relevant to the case. In fact, the first time he told anyone about the computer's sexual contents was after Gill's trial when Brown's counsel asked about child pornography on the computer. Lt. James then told the prosecutor that the computer contained child pornography, bestiality content, and instant message conversations.

Prior to Brown's trial, his counsel requested a copy of the contents of the victim's computer and had its hard drive, including the Internet history, reviewed by a computer analyst.[3] The analyst testified at Gill's Rule 29.15 hearing as to his findings. The analyst used software to decode instant messages sent from and received by the victim's computer. On each of the instant messaging files, the profile "dogday_afternoon2002" was used. All six conversations were sexually explicit, and four of those conversations included references to sex with

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[3] Lt. James initially objected because it is a crime to disseminate child pornography, and the prosecutor opposed the request for the same reason. The trial judge, however, ordered the prosecutor to turn over a copy of the computer's contents for use by the defense expert.

underage girls. In one particular conversation, "dogday_afternoon2002" wrote about a 17-year-old daughter named Megan and described her as "5'7" ... 140 ... blonde hair ... blue eyes ... that tight teen girl ass ... 38c." The conversation goes on to describe Megan's anatomy in detail, and then "dogday_afternoon2002" says that he and Megan only do "touchy feely things, but I sure want more."

In addition to decoding the instant messages, the analyst also investigated the Yahoo! profiles found on the computer, including the "dogday_afternoon2002" profile. The basic information listed for the profile revealed the following information about the user: real name-Ralph, age-45, marital status-divorced, gender-male, and occupation-retired. The profile also revealed that the user's hobbies were "boating, fishing, camping, socializing with friends, drinking beer on my boat, Oh, and sex, all kinds, except I don't do men." The user also wrote in his profile that he has a new boat and to "come take a ride with me." Moreover, the user included a picture with his profile, which was an image of a white male from his navel to his feet with his penis exposed.

The analyst also found child pornography images and bestiality content on the victim's computer. The analyst described several of the child pornography images he found on the victim's computer. The pictures were of nude females who appeared to be younger than 18 in sexual poses. Some of the females were sexually developed, while others were sexually undeveloped.

Brown's defense counsel told the prosecutor about the sexual instant message conversations and the

picture of a white male from his navel to his feet with his penis exposed. At this point, the prosecutor filed a motion in Brown's case to exclude the computer's sexual content. His reasoning was that the computer's sexual content was irrelevant and that the defense could not attack the victim's reputation in the penalty phase. The trial judge ruled that the computer's sexual content would be excluded as irrelevant unless the penalty phase witnesses portrayed the victim as someone who "walks on water" or as a "saint."

At the penalty phase of Brown's trial, the prosecution did not present good character evidence about the victim that opened the door to the computer evidence. Although the same four relatives of the victim testified during the penalty phase of Brown's trial, their testimony was more restrained. The prosecutor alerted the witnesses not to cast the victim as a "saint." The sister did not speak about the victim's generosity with money. The brother-in-law did not talk about the character lessons he and the victim learned from the West. The brother discussed the victim's generosity with money but did not mention paying for the funeral of his friend's wife. The daughter's testimony was substantially the same in the penalty phase of both Gill's and Brown's trials.

A jury found Brown guilty of first-degree murder and kidnapping. The State pursued the death penalty, but the jury assessed life imprisonment without parole.[4]

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[4] Brown's sentence to life imprisonment cannot be attributed to different factual scenarios presented to the jury regarding who pulled the trigger to shoot the victim. In their

II. Standard of Review

This Court reviews whether the post-conviction motion court's findings of fact and conclusions of law are clearly erroneous. Rule 29.15(k). Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a " 'definite and firm impression that a mistake has been made.' " *Forrest v. State*, 290 S.W.3d 704, 708 (Mo. banc 2009) (quoting *Goodwin v. State*, 191 S.W.3d 20, 26 (Mo. banc 2006)).

III. Analysis

A. State's Failure to Disclose the Computer's Contents

Gill claims that the motion court clearly erred by not finding that the State committed a *Brady v. Maryland* violation by failing to disclose the contents of the victim's computer prior to trial. In *Brady*, the United States Supreme Court held that the State violates due process if it suppresses evidence that is favorable to the accused and material to either the guilt phase or the penalty phase. 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The State violates due process regardless of whether it withheld the evidence in good faith or in bad faith. *Id.*

Brady applies where, after trial, the defense discovers new information that the prosecution knew

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respective trials, both Gill and Brown claimed that the other pulled the trigger. *See State v. Gill*, 167 S.W.3d 184, 188 (Mo. banc 2005); *State v. Brown*, 246 S.W.3d 519, 524-25 (Mo.App.2008).

at trial. *State v. Salter*, 250 S.W.3d 705, 714 (Mo. banc 2008). If the defense knew about the evidence at the time of trial, no Brady violation occurred. Id. Here, a month before trial, the State disclosed the contents of the computer to defense counsel by sending a copy of the report, which listed all the computer's file folders or directories. Although defense counsel may not have thoroughly examined the report, they possessed it. There was no Brady violation, and the motion court's findings and conclusions regarding this point are not clearly erroneous.[5]

B. Ineffective Assistance of Counsel

Gill next alleges the motion court clearly erred by finding that he did not receive ineffective assistance of counsel because his counsel failed to discover the pornography on the victim's computer. He argues that his counsel could have used the evidence in the penalty phase either to rebut the State's characterization of the victim as a "saint"[6] or to dissuade the State from using character evidence altogether.

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[5] Gill also asserts a Rule 25.03(A)(9) discovery violation for the failure to disclose the computer's contents. Violations of discovery rules are usually outside the scope of a Rule 29.15 motion. *Merriweather v. State*, 294 S.W.3d 52, 55 (Mo. banc 2009). If the violation of the discovery rule implicates due process, then the Court may consider the violation in a Rule 29.15 motion. Id. Because no denial of due process took place here, Gill's claim is without merit.

[6] Along with presenting character evidence about the victim during the penalty phase, during the opening statement for the guilt phase, the prosecutor referred to the victim as a "Good Samaritan" who gave Gill a place to stay when he had nowhere to live.

To prove ineffective assistance of counsel sufficient to reverse a death sentence, the movant must establish the two prongs of the *Strickland v. Washington* test. 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the movant must establish that counsel's performance was deficient. *Id.* Counsel's performance is deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052. There is a strong presumption that counsel's conduct was reasonable and effective. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006). To overcome that presumption, the defendant must identify specific acts or omissions that, in light of all the circumstances, fell outside the wide range of professional, competent assistance. *Id.* Second, the movant must establish that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Prejudice exists in a death penalty case if there is a reasonable probability that, but for counsel's deficient performance, the jury would have recommended life imprisonment rather than the death penalty. *Forrest*, 290 S.W.3d at 708.

1. Victim Impact Character Evidence

The trial court has broad discretion during the penalty phase to admit any evidence it deems helpful to the jury in assessing punishment. *State v. Gill*, 167 S.W.3d 184, 195 (Mo. banc 2005). The implication of the death penalty entitles the jury to evidence that may assist it in making its recommendation, including victim impact testimony. *See State v. Kreutzer*, 928 S.W.2d 854, 874 (Mo. banc 1996).

Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. McLaughlin*, 265 S.W.3d 257, 273 (Mo. banc 2008). Victim impact statements are another method of showing the jury the harm caused by the crime. *State v. Storey*, 40 S.W.3d 898, 908 (Mo. banc 2001). Such evidence illustrates that the victim's death represented a unique loss to the family. *Gill*, 167 S.W.3d at 195. Just as the defendant is allowed to present mitigation evidence showing he is a unique individual, the State is allowed to present evidence showing the victim's uniqueness as well. *Storey*, 40 S.W.3d at 909.

Not every piece of victim impact evidence must relate to the direct impact of the victim's death on the witness. *Gill*, 167 S.W.3d at 196. As this Court already decided in Gill's direct appeal, while portions of the victim impact evidence did not relate to the direct impact of the victim's death, the testimony was still proper. *Id.*

Generally, neither the State nor the defense may introduce character evidence about the victim in a murder case. *See State v. Hall*, 982 S.W.2d 675, 681 (Mo. banc 1998).[7]FN7 If the State attempts to introduce evidence of the good character of a victim in the penalty phase, defense counsel has two

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[7] If the defendant raises self-defense, the State may introduce evidence of the good character of the victim in a murder case. *See Hall*, 982 S.W.2d at 681. If so raised, "[a] victim's reputation for violence, turbulence, and aggression may be admissible." *State v. Gonzales*, 153 S.W.3d 311, 312 (Mo. banc 2005).

options. Defense counsel may object to the introduction of the character evidence. If defense counsel chooses this option, the trial court should sustain the objection and disallow the character evidence. Alternatively, defense counsel may, as a strategic maneuver, choose to allow the State to present the good character evidence of the victim. By doing so, the State opens the door for the defense to present rebuttal character evidence.

Here, the State introduced character evidence regarding the victim from family members' testimony.[8] The victim's sister testified as to the victim's generosity with money. The victim's brother-in-law testified about the victim's fascination with the characters from the Old West and the valuable life lessons those characters taught. The victim's younger brother testified about his relationship with the victim and the victim's generosity with what little money the victim had, including paying for a funeral for his friend's wife.

2. Gill's Counsel's Performance Was Deficient

When the State introduced evidence regarding the victim's good character, Gill's counsel should have presented rebuttal evidence. However, his counsel failed to present rebuttal character evidence because they failed to discover it. They saw the names of the sexually explicit files on the report but were not diligent in investigating further. Defense

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[8] Defense counsel objected by renewing his motion in limine to limit victim impact evidence to exclude good character testimony about the victim. The objection was overruled.

counsel testified at the Rule 29.15 hearing that after more carefully reviewing the report, they noticed entries that should have alerted them to the presence of pornography on the computer. They had the opportunity to discover the child pornography, bestiality content, and instant message conversations on the victim's computer but neglected to do so.

By failing to discover those files on the victim's computer, Gill's counsel's performance was deficient. A reasonably competent attorney would have carefully reviewed the report provided by the State and recognized file names like "a_sluttyl8girl_w38c" and "sweet_tasting_slute" as evidence of sexually explicit material on the computer. A reasonably competent attorney would have conducted further investigation as to the contents of the computer and discovered the child pornography images, bestiality content, and sexually explicit instant message conversations about the 17-year-old daughter. Then, a reasonably competent attorney would have rebutted the State's character evidence at the penalty phase.

Moreover, a reasonably competent attorney would have interviewed or deposed Lt. James, the investigator who prepared the probable cause statement and the report and who the State had listed as a potential witness. He knew the victim's computer contained sexually explicit material. If Gill's counsel had interviewed or deposed Lt. James about the report, they would have learned about the child pornography images, bestiality content, and sexually explicit instant message conversations on the victim's computer. Then, a reasonably competent attorney would have been able to rebut the State's

character evidence at the penalty phase. Gill's counsel were unprepared to rebut the State's character evidence of the victim and, therefore, their performance was deficient if the prosecutor still chose to introduce that evidence.

3. Gill Suffered Prejudice as a Result of Counsel's Deficient Performance

Although Gill's counsel's performance fell outside the wide range of professional, competent assistance, Gill must also establish that his counsel's deficient performance prejudiced him. If Gill's counsel had discovered the sexually explicit material on the victim's computer, they could have used the evidence in two ways. First, they could have used the sexually explicit material to persuade the prosecutor to limit the testimony to victim impact rather than to elicit positive character evidence. Second, Gill's counsel could have used the sexually explicit material to rebut the State's positive character evidence about the victim.

The jury would have had an alternative description of the victim when it deliberated whether to recommend the death penalty for Gill. There is a reasonable probability that, with the different description of the victim, the jury would have decided that, in its consideration of all of the evidence, the death penalty was not proper punishment for Gill. The reasonable probability of a sentence to life imprisonment rather than a sentence to death is highlighted by counsel's actions and the jury's decision in the later trial of Gill's co-defendant, Justin Brown. That Brown's jury recommended life imprisonment, not death, assists in showing a reasonable probability that, had Gill's counsel

discovered the computer's sexual content, Gill would not have been sentenced to death.

Because Gill has established that his counsel's performance was deficient and that he suffered prejudice as a result of their deficient performance, he has proven he received ineffective assistance of counsel during the penalty phase of his trial. The motion court's findings of fact and conclusions of law were clearly erroneous in finding otherwise.

C. Prosecutor's Negotiation Deception

Gill next claims that the motion court clearly erred in finding that the prosecutor did not engage in prosecutorial misconduct. He alleges that the prosecutor purposely misled defense counsel into believing the State would waive the death penalty if Gill provided information that would lead to the prosecution of another potential defendant. According to Gill, the prosecutor purposely misled defense counsel because he knew that the victim's family wanted the death penalty pursued regardless of his cooperation.

The State may not give misleading information to the defendant. *State v. Kilgore*, 771 S.W.2d 57, 65 (Mo. banc 1989). Here, however, the evidence presented at the Rule 29.15 hearing established that the prosecutor did not convey misleading information to the defendant. The prosecutor testified that he remained open to the possibility of a plea agreement throughout preparation for the case. The prosecutor believed that Gill had no information to implicate another defendant for the murder of the victim, but he still would have considered waiving the death

penalty had Gill provided him with information to charge the potential defendant with a serious crime. The prosecutor's actions did not mislead defense counsel into believing that he would waive the death penalty. The motion court's findings on this point are not clearly erroneous.

D. Lack of Independent Judicial Judgment

Gill finally claims that the motion court lacked independent judicial judgment when it signed the State's proposed findings of fact and conclusions of law. He argues that the findings and conclusions were contrary to how multiple witnesses testified at the Rule 29.15 hearing. Gill failed to preserve this issue for appellate review. Because the motion court was not given an opportunity to review this alleged error, the claim is not preserved for appellate review. *See State v. Kenley*, 952 S.W.2d 250, 260 (Mo. banc 1997). Further, Gill does not seek plain error review.

IV. Conclusion

The judgment is reversed as to the penalty phase insofar as Gill had ineffective assistance of counsel for failing to investigate the victim's computer. In all other respects, the judgment is affirmed. This case is remanded.[9]

All concur.

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[9] Gill raises other errors in regard to the penalty phase. Those points do not need to be discussed in light of this Court's remand for a new penalty phase.

[Excerpted testimony from the post-conviction-hearing transcript ("PCR Tr.")]:

(PCR Tr. at 172, lines 14-23).
[Trial counsel David Kenyon]: . . . [I]t's difficult to know exactly how [the evidence of pornography on the victim's computer] would have been used in trial, because we are in a precarious position as defense attorneys in this case because there's an expression, which seems like a callous expression, but it's very true and we use it in our trade, which is you don't kick a corpse. In penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries.

(PCR Tr. at 175, lines 2-25; 176, lines 1-7, 10-14).
[Trial counsel David Kenyon]: . . . I know we had had discussions with [the prosecutor] about whether there was anything on the computer that could possibly be incriminating to Mark Gill. My focus on the computer was really for the most part, I was focused on evidence that might exist within the computer that would hurt Mark Gill in the guilt phase. For example, if they found evidence on the computer, e-mails that Mark Gill may have sent to people indicating that he had premeditated this killing. Things along those lines are the things I was most concerned about and [the prosecutor] assured us there was nothing on the computer that he was planning on using in this case.

. . . .

Since the brunt of my concern was whether or not there was evidence in there that would incriminate Mark Gill, I felt comfortable when he said there was

nothing on the computer he was planning on using. I felt comfortable focusing my attention elsewhere.

(PCR Tr. at 178, lines 2-10).
[Trial counsel David Kenyon]: . . . [M]y focus just simply was not on whether there would have been pornography on the computer. I was really so very focused on trying to discover whatever incriminating evidence there might be on Mark Gill. When [the prosecutor] told me there was nothing on there he planned on using, there were enough things to do on the case that I probably would not have worried about it if there was some pornography on the computer.

(PCR Tr. at 192, lines 4-9).
Q [by State's attorney Ted Bruce]: . . . And during the many times that you interviewed and spoke to Mr. Gill, Mr. Gill never told you anything about there being any improper chat or any other type of communications on the computer involving [the victim] that he knew about?
A [by trial counsel David Kenyon]: No.

(PCR Tr. at 305, lines 20-25; 306, lines 1-3).
[Trial counsel Sharon Turlington]: . . . I would have no reason to think there would be child pornography or any kind of pornography on the computer. I mean, just really wouldn't be something that I would be concerned about, you know, specifically in this case.
Q [by State's attorney Ted Bruce]: Did Mark [Gill] ever tell you anything about pornography or child pornography being on that computer?
A: No.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 22 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 09-1327

STATE OF MISSOURI,

Petitioner,

v. **CAPITAL CASE**

MARK GILL,

Respondent.

APPENDIX
TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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167 S W.3d 184
(Cite as: 167 S.W.3d 184)

Supreme Court of Missouri,
En Banc.
STATE of Missouri, Respondent,
v.
Mark Anthony GILL, Appellant
No. SC 85955.

July 12, 2005.
Rehearing Denied Aug. 2, 2005.

Background: Defendant was convicted in the Circuit Court, New Madrid County, Fred W. Copeland, J., of first-degree murder, armed criminal action, kidnapping, first-degree robbery, and first-degree tampering, and he was sentenced to death Defendant appealed

Holdings: The Supreme Court, Stephen N Limbaugh, Jr , J , held that
(1) trial court was warranted in submitting disjunctive verdict directors for first- and second-degree murder that attributed conduct elements of shooting victim to either defendant or cohort,
(2) prosecutor's use of hypothetical during voir dire to inquire on accomplice liability was permissible;
(3) defendant did not show that emotion of witnesses who presented victim-impact testimony was so unduly prejudicial that it rendered trial fundamentally unfair;
(4) references by victim's sister to death of her and victim's parents was permissible victim-impact testimony;
(5) testimony of victim's sister and brother-in-law on their family values was permissible victim-impact testimony;
(6) record supported jury's findings of statutory aggravating circumstances, and
(7) death sentence was not excessive

Affirmed.

West Headnotes

[1] Homicide 203 ⟹1466

203 Homicide
203XII Instructions
203XII(D) Parties
203k1466 k Aiding, Abetting, or Other Participation in Offense Most Cited Cases
Evidence was not clear as to whether it was defendant or cohort who shot victim, and thus trial court was warranted in submitting disjunctive verdict directors for first- and second-degree murder that attributed conduct elements of shooting victim to either defendant or cohort, even though defendant stated during confession that cohort was shooter, defendant admitted to planning murder, abducting victim, tying him up, driving him to secluded location, digging his grave, and being present when he was shot and killed, defendant's statement was wholly self-serving, and several of defendant's other statements during confession were inconsistent internally and with physical evidence. MAI Criminal 3d No 304.04, Note on Use 5(c).

[2] Criminal Law 110 ⟹805(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions. Necessity, Requisites, and Sufficiency
110k805 Form and Language in General
110k805(1) k In General. Most Cited Cases
Whenever there is a state-approved criminal jury instruction applicable under the law and notes on use, the instruction is to be given to the exclusion of any other instruction.

[3] Criminal Law 110 ⟹1172.1(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172 1 In General

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110k1172 1(2) k Particular Instructions Most Cited Cases
Defendant was not prejudiced by any error in trial court's submission of disjunctive verdict directors for first- and second-degree murder that attributed conduct elements of shooting victim to either defendant or cohort; defendant's admitted affirmative actions, such as driving victim to secluded location, advanced criminal enterprise and rendered him just as guilty as if he alone committed acts

[4] Jury 230 ⇒131(17)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(15) Form and Sufficiency of Questions Propounded
230k131(17) k. Personal Opinions and Conscientious Scruples Most Cited Cases
Prosecutor's use of hypothetical during voir dire of capital-murder trial to inquire on accomplice liability conformed to basic concept of accomplice liability and, thus, was permissible, even though defendant argued that hypothetical should have ended with "then both of them can be guilty" rather than "then both of them are guilty," where prosecutor stated that typical example of accomplice liability was "that if two guys are robbing a bank and one waits out in the car as the guy driving a get-away vehicle and the other one goes in and does the robbery, then both of them are guilty of robbery," and prosecutor emphasized that judge would give jury exact law of case.

[5] Criminal Law 110 ⇒1152.2(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.2 Jury
110k1152.2(2) k. Selection and Impaneling. Most Cited Cases
(Formerly 110k1152(2))

Jury 230 ⇒131(2)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(2) k. Discretion of Court. Most Cited Cases
Nature and extent of questioning on voir dire is within a trial court's discretion and will not be disturbed absent an abuse of discretion.

[6] Jury 230 ⇒131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal Opinions and Conscientious Scruples Most Cited Cases
A trial court may permit parties to inquire during voir dire as to whether potential jurors have preconceived notions on the law that will impede their ability to follow instructions on issues that will arise in the case

[7] Jury 230 ⇒131(13)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) k. Mode of Examination Most Cited Cases
Prosecutors are entitled during voir dire to use hypotheticals to make an inquiry on accomplice liability.

[8] Jury 230 ⇒131(13)

230 Jury
230V Competency of Jurors, Challenges, and

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Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) k. Mode of Examination Most Cited Cases
When a prosecutor during voir dire uses hypotheticals to make an inquiry on accomplice liability, if the prosecutor does not misstate the basic concept of accomplice or accessory liability, even if the description is incomplete, there is no error

[9] Sentencing and Punishment 350H ⚖ 1789(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Defendant waived appellate review of his claim on appeal from death sentence that jury instruction on statutory aggravating circumstance that murder involved depravity of mind was unsupported by evidence that he shot victim or participated in shooting, where defendant did not challenge instruction at trial on that ground V.A.M.S. § 565.032, subd. 2(7)

[10] Sentencing and Punishment 350H ⚖ 1652

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 k. Aggravating Circumstances in General. Most Cited Cases
A defendant is eligible for the death penalty where at least one valid statutory aggravator is found V.A.M.S. § 565.032.

[11] Criminal Law 110 ⚖ 1166.18

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.18 k. Overruling Challenges to Jurors Most Cited Cases
A conviction cannot be challenged based on the trial court's failure to strike for cause a prospective juror if that prospective juror was removed by a peremptory challenge. V.A.M.S. § 494.480, subd. 4

[12] Constitutional Law 92 ⚖ 2370

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2369 Criminal Law
92k2370 k. In General Most Cited Cases
(Formerly 92k52)

Criminal Law 110 ⚖ 1166.18

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.18 k. Overruling Challenges to Jurors. Most Cited Cases
Legislature did not usurp powers of judiciary by enacting statute providing that a conviction cannot be challenged based on a trial court's failure to strike for cause a prospective juror if that prospective juror was removed by a peremptory challenge; right to panel of qualified jurors from which to make peremptory challenges is founded on statute and is not constitutional in nature V.A.M.S. § 494.480, subd. 4

[13] Jury 230 ⚖ 33(2.10)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right

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230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2 10) k. In General. Most Cited Cases

Jury 230 ⟹135

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k134 Peremptory Challenges
230k135 k. In General. Most Cited Cases
A defendant's right to a panel of qualified jurors from which to make peremptory challenges is founded on statute and is not constitutional in nature, the only constitutional requirement is that the jury actually seated must be made up of qualified and impartial jurors V A M S. § 494 480, subd. 4

[14] Criminal Law 110 ⟹1166.18

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 5 Conduct of Trial in General
110k1166 18 k. Overruling Challenges to Jurors Most Cited Cases
Statute providing that a conviction cannot be challenged based on a trial court's failure to strike for cause a prospective juror if that prospective juror was removed by a peremptory challenge has the rational purpose of avoiding unnecessary retrials in cases where the jury that decided the case met all constitutional requirements. V A M S. § 494 480, subd. 4

[15] Homicide 203 ⟹997

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k994 Character and Habits of Parties
203k997 k. Victim Most Cited Cases
Victim-impact evidence is admissible in murder trials under the federal and state constitutions, and the prosecution is allowed to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.

[16] Sentencing and Punishment 350H ⟹304

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk304 k. Discretion of Court. Most Cited Cases
A trial court has broad discretion during the penalty phase of a trial to admit whatever evidence it deems helpful to the jury in assessing punishment.

[17] Sentencing and Punishment 350H ⟹310

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk307 Admissibility in General
350Hk310 k. Harm or Injury Attributable to Offense Most Cited Cases

Sentencing and Punishment 350H ⟹1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most Cited Cases
Victim-impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair

[18] Sentencing and Punishment 350H ⟹1789(9)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence

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350Hk1789(9) k Harmless and Reversible Error. Most Cited Cases
Defendant did not show that emotion of witnesses who presented victim-impact testimony during penalty phase of capital-murder trial was so unduly prejudicial that it rendered proceeding fundamentally unfair, even though defendant asserted that one witness, who was victim's sister, was visibly crying, and second witness, who was victim's brother-in-law, was visibly upset and had been choking back tears; certain level of emotion was to be expected.

[19] Criminal Law 110 €⟹659

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k659 k. Presence and Conduct of Bystanders. Most Cited Cases
A trial court has broad discretion in determining the effect of emotional outbursts on the jury.

[20] Sentencing and Punishment 350H €⟹1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most Cited Cases
References by victim's sister to death of victim's parents was permissible victim-impact testimony during penalty phase of capital-murder trial, references demonstrated how victim helped witness during those situations

[21] Sentencing and Punishment 350H €⟹1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most Cited Cases
Reference of victim's sister to her and victim's father having been prisoner of war and reference of victim's brother-in-law to his poverty as child, as victim-impact testimony during penalty phase of capital-murder trial, did not prejudice defendant, references were brief, and those hardships were not attributed to defendant.

[22] Sentencing and Punishment 350H €⟹1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most Cited Cases
Testimony of victim's sister and brother-in-law regarding their family's moral values was permissible victim-impact testimony during penalty phase of capital-murder trial; testimony explained values held by victim

[23] Sentencing and Punishment 350H €⟹1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most Cited Cases
It is not necessary that every piece of victim-impact evidence relate to the direct impact of the victim's death on the witness

[24] Sentencing and Punishment 350H €⟹1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim Impact. Most

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Cited Cases
Victim impact testimony of victim's brother-in-law at penalty stage of capital murder trial that among the "good life lessons" he and the victim had learned was the principle that "[y]ou never shoot a man in the back, and, two against one is never a good program" was not so unduly prejudicial that it rendered the sentencing fundamentally unfair, even though testimony could be interpreted as indirect reference to crime for which defendant was on trial; in context, it was clear that testimony merely gave an example of lessons of "the mythical west" that brother-in-law and victim had learned together

[25] Sentencing and Punishment 350H ⇐1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
Record supported jury's findings in death-penalty case of statutory aggravating circumstances that murder was committed for purpose of receiving money, that it was committed while defendant was engaged in perpetration of kidnapping, and that it involved depravity of mind; defendant planned to kill victim to get access to victim's bank account, defendant abducted and bound victim, drove him to desolate cornfield, and helped dig his grave, and defendant ignored defendant's pleas and stood by and did nothing as gun twice misfired before victim was shot and killed. V A M S § 565 032, subd. 2(4, 7, 11)

[26] Sentencing and Punishment 350H ⇐1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct Most Cited Cases

Sentencing and Punishment 350H ⇐1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
Death sentence for murder was not excessive; murder was committed for purpose of receiving money, was committed while defendant was engaged in perpetration of kidnapping, and involved depravity of mind, in that defendant planned to kill victim to get access to victim's bank account, defendant abducted and bound victim, drove him to desolate cornfield, and helped dig his grave, and defendant ignored victim's pleas and stood by and did nothing as gun twice misfired before victim was shot and killed. V A M S § 565 032, subd 2(4, 7, 11)

*187 Deborah B Wafer, Office of the Public Defender, St Louis, for Appellant

Jeremiah W. (Jay) Nixon, Atty Gen, Erwin O Switzer, III, Assistant Atty Gen, Jefferson City, for Respondent

STEPHEN N LIMBAUGH, JR, Judge

A New Madrid County jury convicted Mark A. Gill of first-degree murder, armed criminal action, kidnapping, first-degree robbery, and first-degree tampering Gill was sentenced to death on the murder count, life imprisonment on the robbery count, and consecutive sentences of thirty years imprisonment on the armed criminal action count, fifteen years on the kidnapping count, and seven years on the tampering count. Because the death penalty was imposed, this Court has exclusive jurisdiction of the appeal. Mo Const art V, sec 3. The judgment is affirmed

I Facts

The facts, which this Court reviews in the light most favorable to the verdict, *State v Christeson*, 50 S W 3d 251, 257 (Mo banc 2001), are as follows

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(Cite as: 167 S.W.3d 184)

The victim, Ralph Lee Lape, Jr , lived alone in rural Cape Girardeau County. During the summer of 2002, Mr Lape allowed Gill to live in a camper trailer on his property as a favor to a mutual friend Mr Lape spent the Fourth of July holiday weekend at Kentucky Lake, while Gill and a friend, Justin Brown, remained at Mr. Lape's home. During this time, Brown looked through Mr. Lape's personal papers and learned that he had a large amount of money in his bank account Brown and Gill decided that they would kill Mr. Lape for his money, and on Saturday, July 6, they began preparations for the killing They obtained a 22 pistol from Mr Lape's home and bought a roll of duct tape, and they decided to "get him" in the garage because "once you pull in the garage can't nobody see "

Mr. Lape arrived home from Kentucky Lake on Sunday, July 7, at approximately 5:30 p m Gill and Brown, who were waiting in the garage, opened the garage door for him After Mr. Lape stepped out of his extended cab pickup truck, Gill and Brown "grabbed him," and Gill told Mr. Lape that they "just wanted his money." Mr. Lape pleaded to Gill, "You don't have to do this . I'll give you what you want Mark, I ain't done nothing but try to help you." Gill and Brown then bound Mr. Lape with plastic ties and the duct tape *188 They pushed up the backseat of Mr Lape's truck and "slid him in " They divided $240 they found in a ziplock bag that Mr. Lape had been carrying. Gill then put shovels in the back of the truck because he "knew what [he] was fixin' to do, [he] was going to hell."

Gill drove the truck south on Interstate 55 as Brown held Mr. Lape down on the floorboard After finding Mr. Lape's ATM bankcard in the truck, Gill asked him for the pin number, and he told them the number "right off " Gill and Brown drove Mr. Lape approximately 80 miles to a desolate cornfield near Portageville, where they took turns "knocking down corn" and "digging a hole." While one of them dug the hole, the other sat in the truck and watched Mr. Lape. After digging the hole, they took Mr Lape out of the truck and removed the duct tape and plastic ties Ignoring Mr Lape's pleas for mercy, Gill and Brown pushed him into the hole. Then one of them pointed the 22 pistol at Mr Lape and pulled the trigger, but the gun misfired. The trigger was pulled a second time, but there was another misfire. On the third try, the gun fired and shot Mr. Lape in the forehead, killing him. Gill and Brown then "lined him up in the hole" and removed all of his clothing and jewelry Before they buried Mr. Lape, Brown "stepped on his head" in order to make it fit in the hole. An autopsy revealed that, in addition to the gunshot wound, Mr. Lape had a skull fracture that was "not caused by the bullet," three separate bruises on his head, bruising in his chest, and one of his ribs was completely broken in two.

After killing Mr Lape, Gill and Brown changed clothes back at the house and withdrew money from Mr. Lape's bank account with his ATM card. They then drove to St Louis, withdrew more money, and spent nearly a thousand dollars of the money at strip clubs After spending the night at the Adam's Mark hotel in St. Louis, Gill and Brown drove back to Mr. Lape's house, stopping along the way to withdraw more money from Mr. Lape's bank account.

Once at the house, Gill and Brown began to dispose of the evidence. They dumped the shovels in a wooded area and burned their clothing and the clothing they had removed from Mr. Lape's body They threw the gun, Mr Lape's jewelry, and other evidence that would not burn into the Mississippi River Then they drove to Paducah, Kentucky, abandoned Mr Lape's truck in a hospital parking lot, and returned to Mr. Lape's house. When Mr Lape's family members inquired about his whereabouts, Gill and Brown told them that he was at Kentucky Lake

Having withdrawn nearly all of the money from Mr Lape's bank account that was accessible with an ATM card, Gill and Brown used Mr. Lape's computer to transfer $55,000 from another account to the ATM-accessible account. After a friend told

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Gill that there is no limit in Las Vegas on the amount of money that can be withdrawn from an ATM, Gill and his girlfriend drove there and were married. Gill withdrew approximately $1,600 from Mr. Lape's account while on the trip.

Ultimately, Gill was arrested in New Mexico. He initially denied any involvement in Mr Lape's disappearance and claimed he had permission to use the ATM card. However, he later confessed to planning and participating in the murder, but claimed it was Brown who shot Mr. Lape

II. Murder Verdict Directors

[1] Gill's primary argument is that the trial court erred in submitting Instructions 8 and 11, the verdict directors for first and second-degree murder, because they attributed*189 the conduct elements of shooting Mr Lape in the disjunctive to either Gill or Brown He alleges that the jury should have been instructed that it had to find beyond a reasonable doubt that Brown was the shooter, with no reference to the possibility that Gill was the shooter because, according to Gill, there was no evidence that Gill was the shooter This Court disagrees.

Instruction 8, the verdict director for first-degree murder, provided in pertinent part

> A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First that on or about July 7, 2002, *the defendant or* Justin M. Brown caused the death of Ralph L Lape, Jr , by shooting him, and
>
> Second that defendant was aware that *his or* Justin M Brown's conduct was practically certain to cause the death of Ralph L. Lape, Jr , and
>
> Third, that beginning in Cape Girardeau County, Missouri, and ending in New Madrid County, Missouri, *the defendant or* Justin M. Brown caused the death of Ralph L. Lape, Jr after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,
>
> then you are instructed that the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt
>
> Fourth, that with the purpose of promoting or furthering the death of Ralph L Lape, Jr , *the defendant acted together with or* aided Justin M. Brown in causing the death of Ralph L Lape, Jr., and did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,
>
> then you will find the defendant guilty under Count I of murder in the first degree.

(emphasis added) The pertinent portions of this instruction are identical to Instruction 11, the verdict director for second-degree murder.

[2] "Whenever there is an MAI-CR instruction applicable under the law and Notes on Use, the MAI-CR instruction is to be given to the exclusion of any other instruction" *State v Ervin,* 835 S W 2d 905, 922-23 (Mo banc 1992) This instruction was based upon MAI-CR3d 304 04, Note on Use 5(c), which is to be used "[w]here the evidence is not clear or conflicts as to which person (in a group including the defendant) engaged in the conduct constituting the offense" In such situations, Note 5(c) instructs the court to ascribe the conduct elements "to the defendant *or* the other person"

Gill contends that the court should have used instead the language from Note 5(a), which provides that "[w]here the evidence shows the conduct ele-

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ments of the offense were committed entirely by someone other than the defendant and the sole basis for defendant's liability is his aiding the other person . all of the elements of the offense . . should be ascribed to the other person or persons and not to the defendant." Gill claims that "the only evidence of who shot Ralph Lape" came from his confessions, which "unequivocally stated that Justin Brown shot Ralph Lape." Because*190 there was no evidence that he was the shooter, Gill argues, the verdict director should have named Brown as the shooter, rather than stating that "the defendant or Justin M. Brown" shot Mr. Lape.

This Court rejected a similar argument in *State v Dulany,* 781 S.W.2d 52, 55 (Mo. banc 1989), and affirmed the use of a disjunctive instruction because the evidence was unclear as to whether it was the defendant or her accomplice who killed the victims. In that case, the defendant and her accomplice were the last people in the victims' house while they were alive The defendant admitted that she held a gun on the victims, got rope to bind them, and carried out the empty cans of roofing cement that was poured over the victims and set ablaze. The defendant also admitted to fleeing Missouri immediately after these events. In addition, the defendant named a different person responsible for the killings in each of her two confessions

Similarly, in *State v Gilbert,* 103 S.W.3d 743, 747-49 (Mo. banc 2003), this Court held that a verdict director nearly identical to the instruction given here was properly submitted because the evidence was unclear as to who shot the victims The Court's reasoning was based on the fact that the defendant had given inconsistent statements about his involvement in the murder He testified that he tied one of the victims' hands behind her back and led her down the stairs to the basement, but was upstairs when his accomplice shot the victims At the time of his arrest, however, he claimed that he was in the victims' basement with his accomplice when the shots were fired.

Likewise, the verdict directors in this case were properly submitted because the evidence was not clear as to whether it was Gill or Brown who shot Mr. Lape. As in *Dulany* and *Gilbert,* Gill admitted to deep involvement in the crime. He admitted to planning the murder, abducting Mr. Lape, tying him up, driving him to a secluded location, digging his grave, and being present when he was shot and killed And, as in *Dulany,* Gill fled Missouri after the crime. In addition to these admissions, Gill was wholly self-serving in stating that Brown pulled the trigger Obviously, Gill had incentive to try to decrease his level of culpability in the hope that he would be treated less harshly if it were determined that he was not the shooter. Under these circumstances, the identity of the actual shooter-whether Gill or Brown-was unclear.

This conclusion is bolstered by Gill's several inconsistent statements For instance, Gill initially denied any role in Mr Lape's disappearance and claimed that he had permission to use Mr. Lape's ATM card. It was only later that he admitted to taking part in Mr Lape's abduction and murder. Although Gill claimed that it was Brown who pulled the trigger, he also stated that when they accosted Mr. Lape in the garage, "I knew what I was fixin' to do, I was going to hell "

Gill's statements were also inconsistent with the physical evidence. As noted, the autopsy revealed that Mr Lape had a skull fracture that was "not caused by the bullet," three bruises on his head, bruising to his chest, and one of his ribs was completely broken in two. Gill denied that he beat Mr Lape and the only explanations he could provide for these injuries were that he restrained Mr Lape in a "bear hug type hold" in the garage and that Brown stepped on Mr. Lape's head to make it fit in the grave. The medical examiner, however, concluded that Mr Lape was beaten before his death. He testified that the bruises on Mr Lape's head were caused by "a minimum of three" blows to the head, and that it would have taken a "solid *191 punch or kick or something similar" to have broken his rib completely in two. The medical examiner

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also concluded that "one s[illegible]mp" would not have bruised three separate areas of the head, bruised the chest, and broken the rib.

Gill's self-serving account of the murder and the many inconsistencies in his story brought his credibility into issue, and as a result, the jury was not bound by Gill's statement that Brown was the shooter. *Dulany*, 781 S W 2d at 55 Because the evidence was unclear as to whether it was Gill or Brown who actually shot Mr Lape, the trial court did not err by submitting the conduct elements in the disjunctive.

[3] Furthermore, Gill could not have been prejudiced by the disjunctive submission As this Court held in *Dulany*

> Even if there had not been enough evidence for the jury to find defendant committed the acts, the disjunctive submission would not have been reversible error When the aider is found to have purposely aided in capital murder and thus has the same intent of the active participant, all other things being equal, they are liable to the same degree as the active participant Defendant's admitted affirmative actions advanced the criminal enterprise and rendered her just as guilty as if she alone committed the acts.

Id at 56 (internal citations omitted), *see also Gilbert* at 748

III Armed Criminal Action Verdict Directors

In a related point, Gill alleges the trial court erred in submitting Instructions 15, 17 and 19, the verdict directors for armed criminal action, because they did not follow the Notes on Use with regard to accomplice liability

Instruction 15 provided, in pertinent part

> As to Count III, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that defendant committed the offense of murder in the first degree, as submitted in Instruction No 8, and
>
> Second, that defendant committed that offense with the aid of a deadly weapon, then you will find the defendant guilty under Count III of armed criminal action

Instructions 17 and 19 submitted the offense of armed criminal action as to the lesser included offenses of second-degree murder and second-degree felony murder but were otherwise identical to Instruction 15.

These instructions were erroneous, Gill explains, because "the evidence showed [Gill] did not use a weapon" In support, he cites Note on Use 4 to MAI-CR3D 332 02, which requires "[w]here it is alleged that a person other than the defendant employed a deadly weapon or dangerous instrument, the verdict director for armed criminal action must be in the form of MAI-CR 3d 304 04 [aider and accomplice liability] "

To the contrary, as noted, the evidence was unclear as to who fired the gun, so the murder verdict directors properly posited that "defendant or Justin M. Brown" shot Mr. Lape Note on Use 4 also provides that "[w]here the defendant's liability for the underlying felony is premised on accomplice liability and where it is alleged that the defendant himself employed a deadly weapon or dangerous instrument in the commission of the offense, it is not necessary to submit the verdict director on Armed Criminal Action (MAI-CR 3d 332 02) in the form of Aider Liability" Here, the verdict directors in the underlying felony (murder) did in fact allege that *192 Gill "himself employed a deadly weapon or dangerous instrument in the commission of the offense," and although that submission was couched in the disjunctive, it still was unnecessary to use the accomplice liability language of MAI-CR3D 304 04 in the ACA verdict director The trial court did not err in submitting these instructions.

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167 S.W 3d 184
(Cite as: 167 S.W.3d 184)

IV. Voir Dire

[4] Gill next contends that the trial court erred in overruling his objections to the prosecutor's voir dire on accomplice liability. The key portion of the voir dire is as follows.

> PROSECUTOR: The Judge will tell you that in Missouri a person is respons [ible] not only for his own conduct, but also for the conduct of another person in committing a crime. The typical example that is given in law school, that if two guys are robbing a bank and one waits out in the car as the guy driving a get-away vehicle and the other one goes in and does the robbery, then both of them are guilty of robbery.
>
> DEFENSE COUNSEL: Judge, I'm going to object He's not stating the law correctly
>
> THE COURT: Overruled.
>
> PROSECUTOR. And, again, that's just an example The judge will give you the exact law as to this case in the instructions

[5][6][7][8] The nature and extent of questioning on voir dire is within the trial court's discretion and will not be disturbed absent an abuse of discretion. *State v Ramsey,* 864 S W 2d 320. 335 (Mo. banc 1993). A trial court may permit parties to inquire as to whether potential jurors have preconceived notions on the law that will impede their ability to follow instructions on issues that will arise in the case *Id* at 335-36. Prosecutors are entitled to use hypotheticals to make an inquiry on accomplice liability. When a prosecutor does not misstate the "basic concept" of accomplice or accessory liability, even if the description is incomplete, there is no error *State v Clemons,* 946 S.W 2d 206, 224-25 (Mo banc 1997)

Gill alleges that the "prosecutor's hypothetical misled and misinformed the jurors on the law by greatly oversimplifying the law of accomplice liability" The hypothetical was improper, Gill argues, because it "stated the law in absolutes" In Gill's view, the prosecutor should have ended the hypothetical with "then both of them *can be* guilty," rather than "then both of them *are* guilty." This argument has no merit. The prosecutor's hypothetical conformed to the "basic concept" of accomplice liability. *Id* Further, the prosecutor emphasized that the hypothetical was "just an example" and that the judge would give the jury "the exact law as to this case in the instructions"

V Statutory Aggravating Circumstances

Gill asserts that the trial court erred in overruling his objection and submitting Instruction 7A to the jury, concerning statutory aggravating circumstances. The jury found that the following three statutory aggravating circumstances existed 1) that Gill committed the murder for the purpose of "receiving money or any other thing of monetary value from Ralph L. Lape, Jr," section 565 032 2(4), RSMo 2000; [FN1] 2) that Gill committed the murder while "engaged in the perpetration of kidnapping," sec. 565 032 2(11); and 3) that the murder "involved depravity of mind" and "was outrageously and wantonly vile, horrible, and inhuman," sec. 565 032 2(7)

> FN1. All statutory references are to RSMo 2000 unless otherwise indicated.

*193 Gill contends that the first aggravator-that the murder was committed for the purpose of receiving money-should only be applied in "murder for hire" situations To interpret that statute otherwise, he explains, the "receiving money" aggravator would be unnecessarily duplicative of another of the statutory aggravators set out in section 565 032 2(11), which is that the murder was committed during the commission of a robbery. However, despite the separate statutory aggravator for robbery, this Court has consistently held that the "receiving money" circumstance also is applicable to a murder committed during the course of a robbery *State v Kenley,* 952 S W 2d 250, 276 (Mo banc 1997); *State v McDonald,* 661 S W 2d 497, 502-05 (Mo banc 1983)

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There is no compelling reason to depart from these holdings.

[9] Gill also argues the third aggravator-that the murder involved depravity of mind-was unsupported by the evidence The instruction provided that the jury could make a determination of depravity of mind if it found "that the defendant killed Ralph L. Lape, Jr , after he was bound or otherwise rendered helpless by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life " In particular, Gill contends that there was insufficient evidence to support a finding that he "killed" Mr Lape because "there was no evidence [that Gill] shot or even 'participated' in the shooting of Ralph Lape " However, his only objection to this paragraph at trial and in his motion for new trial was that this aggravating circumstance did not apply because "the victim was unbound before he was killed " Gill did not challenge this instruction below on the ground that "there was no evidence [that he] shot or even 'participated' in the shooting " Therefore, he has failed to preserve this issue for review

[10] Furthermore, this Court notes that Gill objects only to the first and third of the aggravators He does not challenge the instruction that he committed the murder while "engaged in the perpetration of kidnapping." Even if the first and third aggravators were invalid, a defendant is "death eligible" where, as here, at least one valid statutory aggravator was found. *State v Morrow*, 968 S W 2d 100, 117 (Mo banc 1998).

VI. Balancing of Aggravating and Mitigating Evidence

Gill argues that the trial court erred in overruling his objections and submitting Instructions 3A, 8A, and 10A, which required the jury to determine whether there were facts or circumstances in mitigation of punishment that were sufficient to outweigh the facts or circumstances in aggravation, so to preclude imposition of the death penalty. These instructions were erroneous, Gill contends, because they did not require the jury to make this finding beyond a reasonable doubt This Court recently rejected this argument in *State v Glass*, 136 S W 3d 496, 520-21 (Mo. banc 2004) Although section 565 030 4 expressly requires the jury to use the reasonable doubt standard for the determination of whether any statutory aggravators exist, the statute does not impose the same requirement on the determination of whether evidence in mitigation outweighs evidence in aggravation *Id*

VII Absence of Statutory Aggravators in Information

Gill next argues that the trial court erred in overruling his motion to quash the information and exceeded its jurisdiction in sentencing him to death because the information did not plead the statutory aggravators later submitted in the penalty phase This, he contends, is required by *194 *Ring v Arizona*, 536 U S 584, 122 S.Ct 2428, 153 L Ed 2d 556 (2002), and *Apprendi v New Jersey*, 530 U S 466, 120 S Ct 2348, 147 L.Ed 2d 435 (2000) Gill's argument is based on the premise that while section 565 020 ostensibly establishes a single offense of first-degree murder, the statutes delineate two separate crimes "unaggravated first-degree murder," which does not require proof of a statutory aggravator and carries a maximum sentence of life without parole, and "aggravated first-degree murder," which requires the additional element of at least one statutory aggravator and carries a maximum sentence of death. Because the information did not plead any statutory aggravators, Gill claims he was charged only with "unaggravated first-degree murder," and, therefore, the court exceeded its jurisdiction in sentencing him to death. This Court has repeatedly rejected this argument *E g , State v Cole*, 71 S W 3d 163, 171 (Mo banc 2002). Missouri's statutory scheme recognizes a single offense of murder with a maximum sentence of death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty *Id* Gill also argues

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that this rationale is contrary to *Blakely v Washington*, 542 U S 296, 124 S Ct. 2531, 159 L Ed 2d 403 (2004), but *Blakely* is inapposite because in that case, as in *Apprendi* and *Ring*, the trial judge increased the defendant's sentence without the required finding of fact by the jury Here, the jury made all factual findings leading to Gill's conviction and sentence.

VIII Peremptory Strike

In his next point, Gill alleges the trial court erred in overruling his motion to strike for cause a prospective juror who indicated in a juror questionnaire that he favored the death penalty because it saves money After the trial court denied Gill's motion to strike for cause, Gill used one of his peremptory challenges to remove the prospective juror

[11] Missouri law is clear that a conviction cannot be challenged based on the trial court's failure to strike for cause a prospective juror if that prospective juror was removed by a peremptory challenge. Section 494 480.4 provides, in pertinent part

> The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant

[12][13] Gill argues that this statute is unconstitutional because it denies "access to the Missouri courts of justice," which apparently is a way of saying that in enacting section 494 480 4, the legislature has usurped the powers of the judiciary. However, the right to a panel of qualified jurors from which to make peremptory challenges is founded on statute and is not constitutional in nature *State v Gray*, 887 S.W 2d 369, 383 (Mo. banc 1994). The only constitutional requirement is that the jury actually seated must be made up of qualified and impartial jurors *State v Nicklasson*, 967 S W 2d 596, 612 (Mo banc 1998). Absent a constitutional provision to the contrary, the legislature does not usurp judicial power by changing or revoking a right created by statute *Suffian v Usher*, 19 S W 3d 130, 134 (Mo banc 2000). Accordingly, the legislature did not impermissibly deny "access to the Missouri courts of justice" by enacting this section.

This Court also rejects Gill's assertion that section 494 480.4 violates the equal protection clause "because its restrictions *195 on challenging a trial court's denial of strikes for cause do not apply to civil litigants." Gill's assumption that civil and criminal litigants are treated differently is erroneous because civil litigants are also precluded from challenging a trial court's failure to remove a prospective juror for cause if that juror is removed by a peremptory strike and does not actually sit on the jury *Rodgers v Jackson County Orthopedics, Inc*, 904 S W 2d 385, 389-91 (Mo App 1995)

[14] Gill also claims that there is no rational basis for treating alleged juror empanelling errors that are cured by a peremptory challenge different from other alleged jury empanelling errors. To the contrary, section 494 480.4 has the rational purpose of avoiding unnecessary retrials in cases where the jury that decided the case met all constitutional require- ments

Because the prospective juror did not sit on the jury and participate in the verdict, Gill is precluded from challenging the trial court's refusal to strike that prospective juror for cause.

IX. Victim Impact Testimony

[15][16][17] Gill asserts that the testimony of Diane and Mitch Miller, the sister and brother-in-law of Mr Lape, exceeded the guidelines for victim impact evidence established by the United States Supreme Court in *Payne v Tennessee*, 501 U S. 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991) Victim impact evidence is admissible under the United

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States and Missouri constitutions, and the prosecution is allowed to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family. *State v Deck*, 994 S W 2d 527, 538 (Mo banc 1999) (citing *Payne*, 501 U S at 825. 111 S Ct 2597) The trial court has broad discretion during the penalty phase of the trial to admit whatever evidence it deems helpful to the jury in assessing punishment. *State v Johns*, 34 S W 3d 93, 112 (Mo banc 2000). Victim impact evidence violates the constitution only if it "is so unduly prejudicial that it renders the trial fundamentally unfair" *Payne*, 501 U S at 825, 111 S Ct 2597.

During the penalty phase, the court allowed Mrs Miller to stand near the jury to show small photographs of Mr Lape and his family to the jurors, and Gill did not object to this procedure as the first twenty-seven photographs were shown Mrs Miller then showed the jury a photograph of their mother's home and talked about how she and Mr Lape had cleaned out the house after their mother became ill. Gill objected that Mrs Miller was positioned "a foot from the jury [and was] visibly crying." Gill also objected that the photo was not victim impact evidence and was "beyond anything that should be allowed." The court directed the prosecutor to have Mrs. Miller sit in the witness stand and overruled the objection that the testimony was not victim impact evidence

Mrs. Miller later read a prepared statement that discussed the impact of the crime on her family. The statement included moral lessons she and her siblings had learned from their parents about the importance of "working hard" and "liv [ing] within your means" She also mentioned that their father had been a prisoner of war during World War II. Gill objected, and the court directed the prosecutor to tell Mrs Miller to omit further references to her father Mrs Miller also discussed their parents' deaths and how Mr. Lape helped steady her hand when she signed a consent form to remove their father's life support

Mr Miller then testified about the impact of the murder on his life He discussed the "valuable good life lessons" that *196 he and Mr. Lape had learned studying "the mythical west." Among these lessons, Mr Miller related, were the moral principles that "You don't cheat at cards, you don't start any trouble, but you stand up to it when it comes. You never shoot a man in the back, and, two against one is never a good program." He also discussed how he grew up "terribly, terribly poor" At Gill's request, the court noted for the record that Mr Miller was "visibly upset, and, [had] been choking back tears"

[18][19] Gill contends that the Millers' victim impact testimony involved "excessively emotional content and presentation" The trial court has broad discretion in determining the effect of emotional outbursts on the jury. *Deck*, 994 S W 2d at 539 This Court has previously found no error in cases where victim impact testimony left witnesses and even jurors crying *Id* at 538-39, *State v Middleton*, 995 S W 2d 443, 464 (Mo. banc 1999) Indeed, a certain level of emotion is to be expected when relatives of a murder victim discuss the impact of the crime on their lives. Gill has failed to show that the level of emotion displayed by the witnesses here was "so unduly prejudicial that it render[ed] the trial fundamentally unfair" *Payne*, 501 U S at 825, 111 S Ct 2597.

[20][21][22][23] Gill also argues that much of the Millers' testimony was prejudicial because "it dwelt on their own morally solid upbringings" and "invited the jury to feel sympathy for their painful times . and use that irrelevant evidence to sentence [Gill] to death" It is not necessary that every piece of victim impact evidence relate to the direct impact of the victim's death on the witness *See State v Johnson*, 22 S W 3d 183, 190 (Mo banc 2000) Mrs. Miller's references to her parents' deaths were proper because they demonstrated how Mr Lape helped her during those situations Her reference to her father having been a prisoner of war and Mr. Miller's reference to his poverty as a child were

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brief and did not prejudice Gill because those hardships were not attributed to him. *See State v. Clay*, 975 S.W.2d 121, 132 (Mo. banc 1998). And the Millers' discussion of their family's moral values was permissible in that it explained the values held by Mr. Lape. *See Johnson*, 22 S.W.3d at 190.

[24] In a related argument, Gill claims that "through comparison with their own families and upbringing" the Millers' testimony implied that he "was bereft of values and moral scruples, he had violated the rules of justice which [Mr. Miller], especially, held true, and [Gill] deserved to die." This, according to Gill, was contrary to *Booth v. Maryland*, 482 U.S. 496, 502-03, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), where the United States Supreme Court prohibited evidence that sets forth "family members' opinions and characterizations of the crimes and the defendant." [FN2] This Court disagrees. The Millers' discussion of their family's history and values did not constitute an opinion or characterization of Gill. Although Mr. Miller's statement that "You never shoot a man in the back, and, two against one is never a good program," could be interpreted as an indirect reference to the crime, when taken in context, it is clear that it was merely an example of the lessons of "the mythical west" that he and Mr. Lape had learned together. This testimony was far less explicit than the statements in *Booth*. In that case, family *197 members expressed doubt "that the people who did this could ever be rehabilitated," and opined that "animals" would not have committed the crime. *Booth*, 482 U.S. at 508, 107 S.Ct. 2529. Even if Mr. Miller's statement was impermissible, this Court concludes that it was not "so unduly prejudicial" as to render the trial "fundamentally unfair." *Payne*, 501 U.S. at 825, 111 S.Ct. 2597.

> FN2. Although the United States Supreme Court overruled much of *Booth* in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Court did not address *Booth's* prohibition of evidence that sets forth "family members' opinions and characterizations of the crimes and the defendant."

X. Independent Review

Under section 565.035.3, this Court is required to determine whether:

> (1) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) the evidence supports the jury's finding of a statutory aggravating circumstance;
>
> (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Having thoroughly reviewed the record, this Court concludes that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

[25] Furthermore, this Court holds that the evidence amply supports the jury's finding on the aggravating circumstances that Mr. Lape's murder was committed for the purpose of receiving money, that it was committed while Gill was engaged in the perpetration of kidnapping, and that it involved depravity of mind because the killing exhibited a callous disregard for the sanctity of all human life. As noted, the record shows that Gill planned to kill Mr. Lape in order to get access to his bank account. He abducted and bound Mr. Lape, drove him to a desolate cornfield and helped dig his grave. By his own account, he ignored Mr. Lape's pleas and stood by and did nothing as the gun twice misfired before Mr. Lape was shot and killed. As Gill put it in his confession, he "sold [his] soul" for money.

[26] Finally, this Court concludes that the death sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence,

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and the defendant Death sentences have often been upheld where the defendant committed the murder for the purpose of receiving money or things of monetary value. *See, e g , State v Worthington,* 8 S W 3d 83, 94 (Mo banc 1999), *Deck,* 994 S W 2d at 545, *State v Barnett,* 980 S W 2d 297, 310 (Mo banc 1998); *State v Hall,* 955 S W 2d 198, 211 (Mo banc 1997); *Kenley,* 952 S W.2d at 276 This Court has also upheld death sentences when the murder was committed during the perpetration of a kidnapping *See, e g , Glass,* 136 S W.3d at 521, *State v Link,* 25 S W 3d 136, 150 (Mo banc 2000), *State v Bucklew,* 973 S W 2d 83, 97 (Mo banc 1998); *Nicklasson,* 967 S W 2d at 621-22, *State v Brooks,* 960 S W 2d 479, 495 (Mo banc 1997); *Hall,* 955 S W 2d at 211 And this case is similar to others in which defendants who were sentenced to death showed callous disregard for the sanctity of all human life by murdering people who were helpless or rendered helpless *See, e g , State v Rousan,* 961 S.W 2d 831, 854 (Mo banc 1998), *State v Johnston,* 957 S W 2d 734, 756 (Mo banc 1997); *State v Tokar,* 918 S W 2d 753, 772 (Mo banc 1996); *State v Walls,* 744 S W 2d 791, 800 (Mo banc 1988), *State v. Mallett,* 732 S W 2d 527, 542-43 (Mo. banc 1987) Taking into account the crime, the strength of the evidence, and the defendant, this Court concludes that the death sentence in this case is proportionate to the death sentences imposed in similar cases

*198 XI Conclusion

For the foregoing reasons, the judgment is affirmed.

All concur
Mo ,2005
State v. Gill
167 S W 3d 184

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(Cite as: 300 S.W.3d 225)

H

Supreme Court of Missouri,
En Banc.
Mark GILL, Appellant,
v.
STATE of Missouri, Respondent.
No. SC 89831.

Dec. 1, 2009
Rehearing Denied Jan. 26, 2010

Background: Following affirmance, 167 S.W.3d 184, of conviction and death sentence for first-degree murder, defendant moved for postconviction relief. The Circuit Court, New Madrid County, J. Max Price, J., denied motion. Defendant appealed.

Holdings: The Supreme Court, Mary R. Russell, J., held that:
(1) state did not commit *Brady* violation in death penalty case with its pretrial disclosure of contents of victim's computer, and
(2) trial counsel rendered ineffective assistance in failing to discover child pornography, bestiality content, and sexually explicit instant message conversations on victim's computer that could have been used at penalty phase to rebut state's evidence of victim's good character.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Criminal Law 110 ⇐1158.36

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.36 k. Post-conviction relief. Most Cited Cases
Postconviction motion court's findings of fact and conclusions of law are clearly erroneous if, after reviewing the entire record, there is a definite and firm impression that a mistake has been made.

V.A.M.R. 29.15

[2] Criminal Law 110 ⇐2007

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2007 k. Time and manner of required disclosure. Most Cited Cases
State did not commit *Brady* violation in death penalty case with its pretrial disclosure of contents of victim's computer, which was later found by a computer analyst who testified at postconviction hearing to contain child pornography, bestiality content, and sexually explicit instant message conversions, report sent to defense counsel listed all the computer's file folders or directories, and, although defense counsel may not have thoroughly examined the report, they possessed it.

[3] Constitutional Law 92 ⇐4594(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(1) k. In general. Most Cited Cases

Constitutional Law 92 ⇐4716

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4712 Sentencing Proceedings
92k4716 k. Notice; disclosure and discovery. Most Cited Cases
State violates due process if it suppresses evidence that is favorable to the accused and material to either the guilt phase or the penalty phase, regard-

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less of whether it withheld the evidence in good faith or in bad faith U S C A Const Amend. 14

[4] Criminal Law 110 ⇐1992

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and probable effect of information in general Most Cited Cases

Criminal Law 110 ⇐1995

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information –
110k1993 Particular Types of Information Subject to Disclosure
110k1995 k. Diligence on part of accused, availability of information. Most Cited Cases
Brady violation for suppressing material evidence favorable to the accused applies where, after trial, the defense discovers new information that the prosecution knew at trial, but no *Brady* violation occurs if the defense knew about the evidence at time of trial

[5] Criminal Law 110 ⇐1505

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1505 k. Discovery and disclosure. Most Cited Cases
Violations of discovery rules are usually outside the scope of a motion for postconviction relief, but if the violation implicates due process, then the court may consider the violation in a postconviction motion U S C A Const Amend. 14; V A M R 29.15.

[6] Criminal Law 110 ⇐1959

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1959 k. In general Most Cited Cases
To prove ineffective assistance of counsel sufficient to reverse a death sentence, defendant must establish the two prongs of the *Strickland v. Washington* test first, the defendant must establish that counsel's performance was deficient, second, the 'defendant must establish that counsel's deficient performance prejudiced the defense. U S C A Const.Amend 6

[7] Criminal Law 110 ⇐1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient representation in general Most Cited Cases
Counsel's performance is deficient, as element of ineffective assistance, if it falls below an objective standard of reasonableness, as measured by prevailing professional norms. U S C A Const Amend 6.

[8] Criminal Law 110 ⇐1871

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1871 k. Presumptions and burden of proof in general Most Cited Cases
There is a strong presumption that counsel's conduct was reasonable and effective, and to overcome that presumption, defendant must identify specific acts or omissions that, in light of all the circumstances, fell outside the wide range of professional, competent assistance. U S C A Const Amend. 6.

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[9] Criminal Law 110 ⇐1959

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1959 k. In general. Most Cited Cases
Prejudice exists, with respect to claim of ineffective assistance in a death penalty case, if there is a reasonable probability that, but for counsel's deficient performance, the jury would have recommended life imprisonment rather than the death penalty U.S.C.A. Const.Amend. 6

[10] Sentencing and Punishment 350H ⇐1756

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1756 k. In general. Most Cited Cases
The trial court has broad discretion during the penalty phase of death penalty case to admit any evidence it deems helpful to the jury in assessing punishment.

[11] Sentencing and Punishment 350H ⇐1756

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1756 k. In general. Most Cited Cases

Sentencing and Punishment 350H ⇐1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim impact. Most Cited Cases
The implication of the death penalty entitles the jury to evidence that may assist it in making as recommendation, including victim impact testimony.

[12] Sentencing and Punishment 350H ⇐310

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk307 Admissibility in General
350Hk310 k. Harm or injury attributable to offense. Most Cited Cases
Victim impact evidence is admissible under the Federal and State Constitutions.

[13] Sentencing and Punishment 350H ⇐1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim impact. Most Cited Cases
Just as the defendant is allowed at sentencing phase of capital case to present mitigation evidence showing he is a unique individual, the state is allowed to present evidence showing the victim's uniqueness as well.

[14] Sentencing and Punishment 350H ⇐1763

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1763 k. Victim impact. Most Cited Cases
Not every piece of victim impact evidence at sentencing phase of capital case must relate to the direct impact of the victim's death on the witness.

[15] Homicide 203 ⇐997

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203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k994 Character and Habits of Parties
203k997 k. Victim. Most Cited Cases
Generally, neither the state nor the defense may introduce character evidence about the victim in a murder case.

[16] Homicide 203 ⇐1051(1)

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(1) k. In general. Most Cited Cases
If the defendant raises self-defense, the state may introduce evidence of the good character of the victim in a murder case

[17] Homicide 203 ⇐1051(1)

203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(1) k. In general. Most Cited Cases
A victim's reputation for violence, turbulence, and aggression may be admissible in a murder case if the defendant raises self-defense

[18] Criminal Law 110 ⇐1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of evidence in sentencing phase. Most Cited Cases
If the State attempts to introduce evidence of the good character of a victim in the penalty phase of capital case, defense counsel has two options: counsel may object to the introduction of the evidence, in which case trial court should sustain objection and disallow the evidence; alternatively, defense counsel may, as a strategic maneuver, choose to allow the state to present the good character evidence of the victim and thereby "open the door" for the defense to present rebuttal character evidence

[19] Criminal Law 110 ⇐1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of investigation of mitigating circumstances. Most Cited Cases
Trial counsel's performance was deficient, as element of ineffective assistance, by failing in capital murder prosecution to discover child pornography, bestiality content, and sexually explicit instant message conversations on victim's computer that could have been used at penalty phase to rebut state's evidence regarding victim's good character, counsel saw names of sexually explicit files in report provided by state concerning contents of computer, but were not diligent in investigating further. U.S.C.A. Const.Amend. 6.

[20] Criminal Law 110 ⇐1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of investigation of mitigating circumstances. Most Cited Cases
Defendant in capital murder case was prejudiced, as element of ineffective assistance, by trial counsel's deficient performance in failing to discover child

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pornography, bestiality content, and sexually explicit instant message conversations on victim's computer that could have been used at penalty phase to rebut state's evidence regarding the victim's good character, there was reasonable probability that, with the different description of victim provided by the computer files, jury would have decided that death penalty was not the proper punishment. U.S.C.A. Const.Amend. 6.

[21] Criminal Law 110 ⇐1985

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)1 In General
110k1985 k. Miscellaneous particular issues. Most Cited Cases
Evidence at postconviction hearing established that prosecutor did not purposely mislead defense counsel in capital case into believing that prosecutor would waive death penalty if defendant provided information that would lead to the prosecution of another potential defendant; prosecutor testified to his belief that defendant had no information to implicate another defendant for the murder of the victim, but that he still would have considered waiving death penalty had defendant provided him with information to charge the potential defendant with a serious crime.

[22] Criminal Law 110 ⇐1985

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)1 In General
110k1985 k. Miscellaneous particular issues. Most Cited Cases
The state may not give misleading information to the defendant.

[23] Criminal Law 110 ⇐1042.7(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.7 Proceedings After Judgment
110k1042.7(2) k. Post-conviction relief. Most Cited Cases
Defendant failed to preserve for appellate review the claim that motion court lacked independent judicial judgment when it signed the state's proposed findings of fact and conclusions of law on motion for postconviction relief, where motion court was not given an opportunity to review that alleged error.

*227 William J. Swift, Office of the Public Defender, Columbia, MO, for appellant.

Chris Koster, Attorney General, James B. Farnsworth, Assistant Attorney General, Jefferson City, MO, for respondent.

MARY R. RUSSELL, Judge.

Mark Gill was convicted of first-degree murder by a New Madrid County jury.[FN1] The jury recommended the death penalty, and the trial court agreed, sentencing Gill to death. This Court affirmed the conviction in *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005). Gill sought post-conviction relief by a Rule 29.15 motion, claiming prosecutorial misconduct and ineffective assistance of counsel. The motion court issued an order denying each of his claims. He appeals. Because the death penalty was imposed, this Court has jurisdiction of the appeal. Mo. Const. art. V, sec. 10; Order of June 16, 1988.

FN1. Along with first-degree murder, Gill was also convicted of armed criminal action, kidnapping, first-degree robbery, and first-degree tampering.

Among the issues in this case is whether Gill's

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counsel provided ineffective assistance of counsel by failing to review carefully the directory of the victim's computer, which contained child pornography, or *228 by not interviewing or deposing the investigator who prepared the directory

Although a victim's character is not typically an issue, when the State introduced evidence of the victim's good character in the penalty phase, Gill's counsel should have rebutted the State's good character evidence with the sexually explicit contents of the victim's computer. Because his counsel failed to discover the sexually explicit contents of the victim's computer, Gill's counsel were ineffective This Court affirms the denial of the Rule 29 15 motion as to the guilt phase of the trial, but reverses the denial of the motion as to the penalty phase insofar as Gill had ineffective assistance of counsel for failing to investigate the victim's computer. The case is remanded

I Facts

A Preparation for Trial

Defense counsel David Kenyon and Sharon Turlington did the majority of Gill's trial preparation, including reviewing the documents provided in discovery. Among the documents received were several reports authored by Lt. David James of the Cape Girardeau County Sheriff's Department. Lt James prepared the probable cause statement, which stated that "[Gill] had [the victim's] computer in the car with him at the time of his arrest." Lt. James's name also appeared on several police reports as the supervisor giving other officers investigative assignments. In addition, the State included Lt. James as a witness in the second amended information.

In addition to his work as the officer in charge of the investigation, Lt. James prepared a report, which was a listing of all the file folders or directories on the victim's computer.[FN2] Approximately a month prior to trial, the prosecutor sent defense counsel a copy of the report for their review

FN2 The victim's computer was relevant to the investigation and prosecution of the crime because, after the murder, Gill and his co-defendant, Justin Brown, used the computer to transfer $55,000 from one of the victim's accounts to an ATM-accessible account so that they could access the money

The report included a list of instant message accounts and a list of the users with whom the accounts exchanged messages User name "dogday_afternoon2002" exchanged messages with 16 other users: (1) "a_slutty18girl_w38c," (2) "blackstamma69," (3) "chene_012," (4) "daddoesme15," (5) "elena_ita_girl," (6) "jbnrbi," (7) "jenny_cappa," (8) "kelheann1980," (9) "kelly1_15_1999," (10) "lilnichole14," (11) "lobowolf1960," (12) "msdiane69," (13) "sweet_tasting_slute," (14) "sweetgirl4older," (15) "sweetpiece123," and (16) "tuffyfreemont11 "

Defense counsel reviewed the report prior to trial but did not notice anything that would have alerted them to the presence of pornography on the computer In addition to reviewing the report, Gill's counsel spoke with the prosecutor about the computer's contents Their discussions with the prosecutor focused on whether the computer contained (1) anything possibly incriminating and (2) any e-mails that implicated another potential defendant The prosecutor assured defense counsel that there was nothing on the computer that he planned to use in the case or that implicated another potential defendant. Relying on the prosecutor's assertions, defense counsel decided to focus their attention away from the computer's contents

B Evidence About Victim Presented at Penalty Phase

The prosecutor presented five witnesses during the penalty phase of Gill's trial *229 Sgt Eric

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Friedrich testified as to Gill's prior convictions. The other four witnesses, all relatives of the victim, testified as to how the victim's death affected their lives and to the victim's good character.

First, the victim's sister identified a family photograph album chronicling the victim's life. She also read her prepared impact statement to the jury and spoke about the victim's role in her life, including defending her against other children. She stated how proud the victim was of his daughter when she was born. She said that the image of him cradling his daughter when she was an infant reminded her of a "Mr. Mom." Additionally, she spoke about the victim's generosity with his money.

Second, the victim's brother-in-law testified about his relationship with the victim. The first day they met, the victim helped him push his car to a gas station. When he and his wife wanted to marry, the victim reassured their uneasy family about the couple's decision. The brother-in-law testified that he and the victim studied "the West, the mythical West, and the true West, for years and years," including the characters who taught valuable life lessons, such as "[y]ou don't cheat at cards" and "you don't start any trouble, but you stand up to it when it comes."

Third, the victim's brother read a prepared statement to the jury. He recalled their childhood relationship and how the victim had helped him throughout their adolescent years. As adults, they kept in touch. During one visit, the brother learned that the victim was having serious financial problems because he had been generous with his money, including lending a friend money to pay for his wife's funeral. The brother concluded his statement by paraphrasing Abraham Lincoln's Gettysburg Address. "The world will little note, or long remember what we say here. But they will never forget what we did here." He said that this paraphrase described his memories of the victim.

Fourth, the victim's 17-year-old daughter testified. She told the jury of the impact of her father's death. She indicated that she stays awake at night thinking about how he was murdered. When asked about how her life will be different now that her father was murdered, she replied, "Some day I'm gonna graduate college, and he's not gonna be there to tell me how proud he is of me. And some day I'll get married, and I won't have my dad to walk me down the aisle and tell me how proud he is of me."

C. Post-Penalty Evidence

Lt. James testified at the Rule 29.15 hearing that he knew there was pornography on the computer within a few days of creating the report. Before Gill's trial, he looked at the transcript of the instant message conversation about the 17-year-old daughter. Yet Gill's counsel testified that they chose not to interview or depose Lt. James. Defense counsel testified that while Lt. James was the officer in charge, they chose not to interview or depose him because he did not conduct the investigation himself and would be of little use at trial because his testimony would be hearsay.

Lt. James never told the prosecutor about the instant message conversation prior to Gill's trial because he did not think it was relevant to the case. In fact, the first time he told anyone about the computer's sexual contents was after Gill's trial when Brown's counsel asked about child pornography on the computer. Lt. James then told the prosecutor that the computer contained child pornography, bestiality content, and instant message conversations.

*230 Prior to Brown's trial, his counsel requested a copy of the contents of the victim's computer and had its hard drive, including the Internet history, reviewed by a computer analyst.[FN3] The analyst testified at Gill's Rule 29.15 hearing as to his findings. The analyst used software to decode instant messages sent from and received by the victim's computer. On each of the instant messaging files, the profile "dogday_afternoon2002" was used. All six conversations were sexually explicit, and four of

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those conversations included references to sex with underage girls In one particular conversation, "dogday_afternoon2002" wrote about a 17-year-old daughter named Megan and described her as "5'7" . 140 .. blonde hair . blue eyes . that tight teen girl ass . 38c " The conversation goes on to describe Megan's anatomy in detail, and then "dogday_afternoon2002" says that he and Megan only do "touchy feely things, but I sure want more."

FN3. Lt. James' initially objected because it is a crime to disseminate child pornography, and the prosecutor opposed the request for the same reason. The trial judge, however, ordered the prosecutor to turn over a copy of the computer's contents for use by the defense expert

In addition to decoding the instant messages, the analyst also investigated the Yahoo! profiles found on the computer, including the "dogday_afternoon2002" profile The basic information listed for the profile revealed the following information about the user. real name Ralph, age 45, marital status-divorced, gender-male, and occupation-retired. The profile also revealed that the user's hobbies were "boating, fishing, camping, socializing with friends, drinking beer on my boat, Oh, and sex, all kinds, except I don't do men." The user also wrote in his profile that he has a new boat and to "come take a ride with me " Moreover, the user included a picture with his profile, which was an image of a white male from his navel to his feet with his penis exposed

The analyst also found child pornography images and bestiality content on the victim's computer The analyst described several of the child pornography images he found on the victim's computer The pictures were of nude females who appeared to be younger than 18 in sexual poses Some of the females were sexually developed, while others were sexually undeveloped

Brown's defense counsel told the prosecutor about the sexual instant message conversations and the picture of a white male from his navel to his feet with his penis exposed. At this point, the prosecutor filed a motion in Brown's case to exclude the computer's sexual content His reasoning was that the computer's sexual content was irrelevant and that the defense could not attack the victim's reputation in the penalty phase. The trial judge ruled that the computer's sexual content would be excluded as irrelevant unless the penalty phase witnesses portrayed the victim as someone who "walks on water" or as a "saint."

At the penalty phase of Brown's trial, the prosecution did not present good character evidence about the victim that opened the door to the computer evidence. Although the same four relatives of the victim testified during the penalty phase of Brown's trial, their testimony was more restrained. The prosecutor alerted the witnesses not to cast the victim as a "saint " The sister did not speak about the victim's generosity with money. The brother-in-law did not talk about the character lessons he and the victim learned from the West The brother discussed the *231 victim's generosity with money but did not mention paying for the funeral of his friend's wife The daughter's testimony was substantially the same in the penalty phase of both Gill's and Brown's trials.

A jury found Brown guilty of first-degree murder and kidnapping. The State pursued the death penalty, but the jury assessed life imprisonment without parole [FN4]

FN4 Brown's sentence to life imprisonment cannot be attributed to different factual scenarios presented to the jury regarding who pulled the trigger to shoot the victim. In their respective trials, both Gill and Brown claimed that the other pulled the trigger *See State v Gill*, 167 S W 3d 184, 188 (Mo banc 2005), *State v Brown*, 246 S W 3d 519, 524-25 (Mo.App.2008).

II Standard of Review

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[1] This Court reviews whether the post-conviction motion court's findings of fact and conclusions of law are clearly erroneous. Rule 29 15(k). Findings and conclusions are clearly erroneous if, after reviewing the entire record, there is a " 'definite and firm impression that a mistake has been made' " *Forrest v State*, 290 S W 3d 704, 708 (Mo. banc 2009) (quoting *Goodwin v State*, 191 S W.3d 20, 26 (Mo. banc 2006)).

III Analysis

A State's Failure to Disclose the Computer's Contents

[2][3] Gill claims that the motion court clearly erred by not finding that the State committed a *Brady v. Maryland* violation by failing to disclose the contents of the victim's computer prior to trial In *Brady*, the United States Supreme Court held that the State violates due process if it suppresses evidence that is favorable to the accused and material to either the guilt phase or the penalty phase. 373 U.S 83, 87, 83 S Ct 1194, 10 L Ed 2d 215 (1963). The State violates due process regardless of whether it withheld the evidence in good faith or in bad faith. *Id*

[4][5] *Brady* applies where, after trial, the defense discovers new information that the prosecution knew at trial *State v Salter*, 250 S.W 3d 705, 714 (Mo banc 2008) If the defense knew about the evidence at the time of trial, no *Brady* violation occurred. *Id* Here, a month before trial, the State disclosed the contents of the computer to defense counsel by sending a copy of the report, which listed all the computer's file folders or directories. Although defense counsel may not have thoroughly examined the report, they possessed it. There was no *Brady* violation, and the motion court's findings and conclusions regarding this point are not clearly erroneous.[FN5]

FN5 Gill also asserts a Rule 25 03(A)(9) discovery violation for the failure to disclose the computer's contents. Violations of discovery rules are usually outside the scope of a Rule 29 15 motion. *Merriweather v State*, 294 S W 3d 52, 55 (Mo banc 2009) If the violation of the discovery rule implicates due process, then the Court may consider the violation in a Rule' 29 15 motion. *Id* Because no denial of due process took place here, Gill's claim is without merit

B. Ineffective Assistance of Counsel

Gill next alleges the motion court clearly erred by finding that he did not receive ineffective assistance of counsel because his counsel failed to discover the pornography on the victim's computer He argues that his counsel could have used the evidence in the penalty phase either to rebut the State's characterization of the victim as a "saint" [FN6] or to dissuade the State from using character evidence altogether

FN6. Along with presenting character evidence about the victim during the penalty phase, during the opening statement for the guilt phase, the prosecutor referred to the victim as a "Good Samaritan" who gave Gill a place to stay when he had nowhere to live

*232 [6][7][8][9] To prove ineffective assistance of counsel sufficient to reverse a death sentence, the movant must establish the two prongs of the *Strickland v Washington* test. 466 U S 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984) First, the movant must establish that counsel's performance was deficient *Id* Counsel's performance is deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms *Id* at 688, 104 S Ct 2052 There is a strong presumption that counsel's conduct was reasonable and effective *Anderson v State*, 196 S W 3d 28, 33 (Mo banc 2006). To overcome that presumption,

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the defendant must identify specific acts or omissions that, in light of all the circumstances, fell outside the wide range of professional, competent assistance. *Id* Second, the movant must establish that counsel's deficient performance prejudiced the defense *Strickland*, 466 U S at 687, 104 S Ct 2052 Prejudice exists in a death penalty case if there is a reasonable probability that, but for counsel's deficient performance, the jury would have recommended life imprisonment rather than the death penalty. *Forrest*, 290 S W 3d at 708.

1 Victim Impact Character Evidence

[10][11] The trial court has broad discretion during the penalty phase to admit any evidence it deems helpful to the jury in assessing punishment *State v Gill*, 167 S W 3d 184, 195 (Mo banc 2005). The implication of the death penalty entitles the jury to evidence that may assist it in making its recommendation, including victim impact testimony. *See State v Kreutzer*, 928 S W 2d 854, 874 (Mo banc 1996).

[12][13] Victim impact evidence is admissible under the United States and Missouri Constitutions *State v McLaughlin*, 265 S W 3d 257, 273 (Mo banc 2008) Victim impact statements are another method of showing the jury the harm caused by the crime *State v Storey*, 40 S W 3d 898, 908 (Mo banc 2001). Such evidence illustrates that the victim's death represented a unique loss to the family. *Gill*, 167 S W.3d at 195. Just as the defendant is allowed to present mitigation evidence showing he is a unique individual, the State is allowed to present evidence showing the victim's uniqueness as well. *Storey*, 40 S W 3d at 909

[14] Not every piece of victim impact evidence must relate to the direct impact of the victim's death on the witness *Gill*, 167 S W 3d at 196 As this Court already decided in Gill's direct appeal, while portions of the victim impact evidence did not relate to the direct impact of the victim's death, the testimony was still proper. *Id*

[15][16][17][18] Generally, neither the State nor the defense may introduce character evidence about the victim in a murder case. *See State v. Hall*, 982 S W 2d 675, 681 (Mo banc 1998) [FN7] If the State attempts to introduce evidence of the good character of a victim in the penalty phase, defense counsel has two options Defense counsel may object to the introduction of the character evidence If defense counsel chooses this option, the trial court should sustain the objection and disallow the character evidence Alternatively, defense counsel may, as a strategic maneuver, choose to allow the State to present the ***233** good character evidence of the victim By doing so, the State opens the door for the defense to present rebuttal character evidence.

FN7. If the defendant raises self-defense, the State may introduce evidence of the good character of the victim in a murder case *See Hall*, 982 S W 2d at 681 If so raised, "[a] victim's reputation for violence, turbulence, and aggression may be admissible." *State v Gonzales*, 153 S W 3d 311, 312 (Mo banc 2005)

Here, the State introduced character evidence regarding the victim from family members' testimony [FN8] The victim's sister testified as to the victim's generosity with money. The victim's brother-in-law testified about the victim's fascination with the characters from the Old West and the valuable life lessons those characters taught The victim's younger brother testified about his relationship with the victim and the victim's generosity with what little money the victim had, including paying for a funeral for his friend's wife

FN8 Defense counsel objected by renewing his motion in limine to limit victim impact evidence to exclude good character testimony about the victim The objection was overruled

2 Gill's Counsel's Performance Was Deficient

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[19] When the State introduced evidence regarding the victim's good character, Gill's counsel should have presented rebuttal evidence However, his counsel failed to present rebuttal character evidence because they failed to discover it. They saw the names of the sexually explicit files on the report but were not diligent in investigating further. Defense counsel testified at the Rule 29 15 hearing that after more carefully reviewing the report, they noticed entries that should have alerted them to the presence of pornography on the computer. They had the opportunity to discover the child pornography, bestiality content, and instant message conversations on the victim's computer but neglected to do so.

By failing to discover those files on the victim's computer, Gill's counsel's performance was deficient. A reasonably competent attorney would have carefully reviewed the report provided by the State and recognized file names like "a_sluttyl8girl_w38c" and "sweet_tasting_slute" as evidence of sexually explicit material on the computer A reasonably competent attorney would have conducted further investigation as to the contents of the computer and discovered the child pornography images, bestiality content, and sexually explicit instant message conversations about the 17-year-old daughter Then, a reasonably competent attorney would have rebutted the State's character evidence at the penalty phase.

Moreover, a reasonably competent attorney would have interviewed or deposed Lt James, the investigator who prepared the probable cause statement and the report and who the State had listed as a potential witness He knew the victim's computer contained sexually explicit material If Gill's counsel had interviewed or deposed Lt. James about the report, they would have learned about the child pornography images, bestiality content, and sexually explicit instant message conversations on the victim's computer. Then, a reasonably competent attorney would have been able to rebut the State's character evidence at the penalty phase Gill's counsel were unprepared to rebut the State's character evidence of the victim and, therefore, their performance was deficient if the prosecutor still chose to introduce that evidence.

3. Gill Suffered Prejudice as a Result of Counsel's Deficient Performance

[20] Although Gill's counsel's performance fell outside the wide range of professional, competent assistance, Gill must also establish that his counsel's deficient performance prejudiced him If Gill's counsel had discovered the sexually explicit material on the victim's computer, they could *234 have used the evidence in two ways. First, they could have used the sexually explicit material to persuade the prosecutor to limit the testimony to victim impact rather than to elicit positive character evidence. Second, Gill's counsel could have used the sexually explicit material to rebut the State's positive character evidence about the victim.

The jury would have had an alternative description of the victim when it deliberated whether to recommend the death penalty for Gill There is a reasonable probability that, with the different description of the victim, the jury would have decided that, in its consideration of all of the evidence, the death penalty was not proper punishment for Gill. The reasonable probability of a sentence to life imprisonment rather than a sentence to death is highlighted by counsel's actions and the jury's decision in the later trial of Gill's co-defendant, Justin Brown That Brown's jury recommended life imprisonment, not death, assists in showing a reasonable probability that, had Gill's counsel discovered the computer's sexual content, Gill would not have been sentenced to death

Because Gill has established that his counsel's performance was deficient and that he suffered prejudice as a result of their deficient performance, he has proven he received ineffective assistance of counsel during the penalty phase of his trial The motion court's findings of fact and conclusions of law were clearly erroneous in finding otherwise

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C. Prosecutor's Negotiation Deception

[21] Gill next claims that the motion court clearly erred in finding that the prosecutor did not engage in prosecutorial misconduct He alleges that the prosecutor purposely misled defense counsel into believing the State would waive the death penalty if Gill provided information that would lead to the prosecution of another potential defendant. According to Gill, the prosecutor purposely misled defense counsel because he knew that, the victim's family wanted the death penalty pursued regardless of his cooperation

[22] The State may not give misleading information to the defendant *State v Kilgore*, 771 S W 2d 57, 65 (Mo banc 1989) Here, however, the evidence presented at the Rule 29 15 hearing established that the prosecutor did not convey misleading information to the defendant. The prosecutor testified that he remained open to the possibility of a plea agreement throughout preparation for the case. The prosecutor believed that Gill had no information to implicate another defendant for the murder of the victim, but he still would have considered waiving the death penalty had Gill provided him with information to charge the potential defendant with a serious crime The prosecutor's actions did not mislead defense counsel into believing that he would waive the death penalty The motion court's findings on this point are not clearly erroneous

D Lack of Independent Judicial Judgment

[23] Gill finally claims that the motion court lacked independent judicial judgment when it signed the State's proposed findings of fact and conclusions of law. He argues that the findings and conclusions were contrary to how multiple witnesses testified at the Rule 29 15 hearing Gill failed to preserve this issue for appellate review. Because the motion court was not given an opportunity to review this alleged error, the claim is not preserved for appellate review *See State v Kenley*, 952 S W 2d 250, 260 (Mo banc 1997). Further, Gill does not seek plain error review

IV Conclusion

The judgment is reversed as to the penalty phase insofar as Gill had ineffective *235 assistance of counsel for failing to investigate the victim's computer In all other respects, the judgment is affirmed This case is remanded [FN9]

FN9 Gill raises other errors in regard to the penalty phase Those points do not need to be discussed in light of this Court's remand for a new penalty phase

All concur
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246 S.W.3d 519
(Cite as: 246 S.W.3d 519)

Missouri Court of Appeals,
Southern District,
Division Two
STATE of Missouri, Plaintiff-Respondent,
v.
Justin M. BROWN, Defendant-Appellant.
No. 27911.

Jan. 3, 2008.
Motion for Rehearing or Transfer Denied Jan. 24, 2008

Background: Defendant was convicted in the Circuit Court, Pulaski County, Tracy L. Storie, J., of first-degree murder and kidnapping, and was sentenced to consecutive terms of imprisonment for life without parole for murder and fifteen years for kidnapping. Defendant appealed.

Holdings: The Court of Appeals, Nancy Steffen Rahmeyer, J., held that:
(1) prosecutor's reasons for exercising peremptory strike against female prospective jurors were sufficiently gender-neutral to rebut *Batson* claims,
(2) evidence supported finding that there was no coercion in prosecutor's proffer of leniency to defendant that would render defendant's confessional statements to police involuntary,
(3) evidence supported jury instructions that attributed the conduct element of shooting victim to defendant "or" another perpetrator,
(4) prosecutor's conduct or statements did not deprive defendant of fair trial, and
(5) excusal of an African-American venireman for hardship was warranted.

Affirmed.

West Headnotes

[1] Jury 230 ⇒33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
A defendant can establish a prima facie case of discriminatory jury selection by the totality of the relevant facts of the prosecutor's behavior during the defendant's trial.

[2] Jury 230 ⇒33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
The procedure to determine whether a *Batson* violation occurred has three parts: (1) a defendant must challenge one or more specific venirepersons struck by the state and identify the cognizable protected class to which they belong, (2) the state must provide a nondiscriminatory reason amounting to more than an unsubstantiated denial of discriminatory purpose; and (3) the defendant must show that the state's explanation was merely pretextual and the true reason for the strike was racial.

[3] Criminal Law 110 ⇒1158.17

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.17 k. Jury Selection. Most Cited Cases
(Formerly 110k1158(3))
A trial court's ruling in a *Batson* challenge is entitled to great deference on appeal and will be reversed only if clearly erroneous, leaving the definite and firm impression that a mistake was made.

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[4] Criminal Law 110 ⟹1158.17

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.17 k. Jury Selection. Most Cited Cases
(Formerly 110k1158(3))
Because weighing the legitimacy of a state's explanation for a peremptory strike is, by nature, a subjective exercise, appellate courts place great reliance in the trial court's judgment when reviewing a trial court's ruling in a *Batson* challenge.

[5] Jury 230 ⟹33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Prosecutor's reasons for exercising peremptory strike against female prospective juror, that prospective juror indicated that she could not be the foreperson to sign a death verdict, that she believed death penalty was only appropriate in the most extreme cases, and that she had been on antidepressants in the past, were sufficiently gender-neutral to rebut *Batson* claim, in trial for murder in which prosecutor sought death penalty; the comments may have signaled to prosecutor that prospective juror had difficulty with death penalty that extended beyond a conscientious effort to deliberate its imposition, and prosecutor had worked on a case in the past in which a juror had a "mental episode" during trial.

[6] Jury 230 ⟹33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Prosecutor's reasons for exercising peremptory strike against female prospective juror, that defendant in the case did not have a history of violence and that prospective juror had indicated that, although she believed death penalty was necessary in some cases she would lean toward life if defendant had no history of violence, were sufficiently gender-neutral to rebut *Batson* claim in trial for murder in which prosecutor sought death penalty.

[7] Constitutional Law 92 ⟹4664(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4664 Circumstances Under Which Made, Interrogation
92k4664(2) k. Particular Cases. Most Cited Cases

Criminal Law 110 ⟹520(2)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k520 Promises or Other Inducements
110k520(2) k. Sufficiency of Promise or Inducement in General. Most Cited Cases
Substantial evidence supported trial court finding that there was no coercion in prosecutor's proffer of leniency to defendant that would render defendant's confessional statements to police involuntary and thus inadmissible as a matter of due process, the leniency negotiations were based on prosecutor's reliance on defendant's statement to police that he was not involved with actual murder, such statement was false, and defendant was given full warning that his statements would be used against him and that he would be charged with murder if he was involved in the actual murder or if he had lied to police. U.S.C.A. Const.Amend. 5.

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[8] Constitutional Law 92 ⇨4663

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4663 k Voluntariness, Compulsory Testimony, and Self-Incrimination in General Most Cited Cases
The due process clause forbids convictions based in whole or in part on an involuntary confession U.S.C.A. Const Amend. 5

[9] Constitutional Law 92 ⇨4664(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4661 Statements, Confessions, and Admissions
92k4664 Circumstances Under Which Made, Interrogation
92k4664(1) k. In General. Most Cited Cases
The test for the voluntariness of a defendant's confession, as would comport with due process, is whether, under the totality of the circumstances, the defendant was deprived of free choice to admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that defendant's will was overborne at the time he confessed. U.S.C.A. Const Amend. 5

[10] Criminal Law 110 ⇨1158.13

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.13 k. Admission, Statements, and Confessions. Most Cited Cases
(Formerly 110k1158(4))
The Court of Appeals reviews a trial court's findings as to whether a defendant's confession was voluntary by determining whether substantial evidence supports the ruling.

[11] Homicide 203 ⇨1465

203 Homicide
203XII Instructions
203XII(D) Parties
203k1465 k. In General. Most Cited Cases
Evidence supported trial court findings that defendant and other perpetrator in shooting murder were joint actors and that it was unclear as to which of the two committed conduct acts of the offense of murder, such that jury instruction that attributed the conduct element of shooting the victim to defendant "or" the other perpetrator and that instructed that defendant "acted together with" the other perpetrator, was appropriate, even if defendant and prosecutor stated that the other perpetrator was the one who pulled trigger, defendant heard and concurred in murder plan, bought duct tape, was present when victim was bound and was present at shooting site, statements from defendant were inconsistent as to raise doubt regarding whether other perpetrator was actual shooter, and victim had additional unexplained injuries. V.A.M.S. § 565.020, MAI Criminal 3d No. 304.04

[12] Criminal Law 110 ⇨1159.2(7)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) k. Reasonable Doubt. Most Cited Cases
Appellate review of a claim of insufficient evidence to support given jury instructions in a criminal case is limited to determining whether sufficient evidence was admitted at trial from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt.

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[13] Criminal Law 110 ⟹1159.2(1)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159 2 Weight of Evidence in C
110k1159 2(1) k In General Most Cited Cases

Criminal Law 110 ⟹1159.2(9)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159 2 Weight of Evidence in General
110k1159 2(9) k Weighing Evidence Most Cited Cases
The reviewing court in a criminal case is not to reweigh evidence; rather, its function is to determine if conviction is supported by sufficient evidence

[14] Criminal Law 110 ⟹2083

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2083 k Demonstrative Conduct by Counsel Most Cited Cases
(Formerly 110k723(1), 110k703)

Criminal Law 110 ⟹2117

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2102 Inferences from and Effect of Evidence
110k2117 k Homicide and Assault with Intent to Kill Most Cited Cases
(Formerly 110k703, 110k713)

Criminal Law 110 ⟹2146

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2146 k In General Most Cited Cases
(Formerly 110k723(1))
Prosecutorial conduct during voir dire, opening statements, and closing arguments of murder trial did not create a pattern of misconduct that deprived defendant of fair trial, although defendant objected to prosecutor's use of term "they" when referencing shooting of victim, which act was allegedly attributed by another actor, prosecutor's use of a chart that purportedly advised jury to consider other actor's conduct as evidence of defendant's deliberation, and prosecutor's act of kneeling to describe gunshot wound as consistent with victim kneeling in grave, state's position was that both defendant and other actor participated in the murder, prosecutor's chart argued facts he believed supported evidence of deliberation, and prosecutor's alleged kneeling mimicked acts described by defendant in confession video U S C A Const Amend 5; V A M S § 565.020

[15] Constitutional Law 92 ⟹4629

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4627 Conduct and Comments of Counsel; Argument
92k4629 k Prosecutor Most Cited Cases
Prosecutorial misconduct is unconstitutional when it so infects the trial with unfairness as to make the resulting conviction a denial of due process U S C A Const Amend 5

[16] Constitutional Law 92 ⟹4629

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92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4627 Conduct and Comments of Counsel, Argument
92k4629 k Prosecutor Most Cited Cases

Sentencing and Punishment 350H ⇐1464

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(D) Prosecutions
350Hk1464 k. Arguments and Conduct of Counsel. Most Cited Cases
Prosecutorial argument may not be so outrageous as to violate due process and the Eighth Amendment U S C A Const Amends. 5, 8

[17] Criminal Law 110 ⇐1171.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171 1 In General
110k1171.1(1) k. Conduct of Counsel in General. Most Cited Cases
Any alleged prosecutorial misconduct, alone, does not warrant reversal of an otherwise valid conviction.

[18] Criminal Law 110 ⇐1171.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171 1 In General
110k1171 1(1) k. Conduct of Counsel in General. Most Cited Cases
Prosecutorial conduct that is undesirable or even universally condemned does not warrant reversal unless it so infected the trial with unfairness as to make the resulting conviction a denial of due process U S C A. Const Amend 5.

[19] Criminal Law 110 ⇐1152.19(7)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152 19 Counsel
110k1152 19(7) k Arguments and Statements by Counsel. Most Cited Cases
(Formerly 110k1154)

Criminal Law 110 ⇐2063

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2061 Control of Argument by Court
110k2063 k Discretion of Court in Controlling Argument Most Cited Cases
(Formerly 110k699)
The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted.

[20] Jury 230 ⇐75(2)

230 Jury
230IV Summoning, Attendance, Discharge, and Compensation
230k75 Excusing and Discharging Jurors from Attendance
230k75(2) k Discretion of Court Most Cited Cases
Trial court acted within its discretion in excusing an African-American venireman for hardship, in murder trial, where venireman stated that he had a doctor's appointment for ankle surgery the following Monday of the trial, that he could not be rescheduled for surgery for another three months, and

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that he was always in pain despite taking pain medication

*522 Janet M. Thompson, Columbia, MO, for appellant

Jeremiah W. (Jay) Nixon, Atty. Gen., Roger W. Johnson, Jefferson City, MO, for respondent.

NANCY STEFFEN RAHMEYER, Judge.

Justin M. Brown ("Appellant") was found guilty by a jury of first-degree murder in violation of section 565.020 and one count of kidnapping in violation of section 565.110.[FN1] Appellant waived jury sentencing for the kidnapping charge. The State sought the death penalty for the murder charge; however, the jury assessed punishment as life imprisonment without parole. The trial court sentenced Appellant to consecutive terms of imprisonment for life without parole for first-degree murder and fifteen years for kidnapping. Appellant brings five points on appeal alleging error during jury selection, error in the verdict director, a constitutional violation and prosecutorial misconduct. We find no error and affirm the rulings of the trial court.

FN1. All references to statutes are to RSMo 2000, unless otherwise specified.

Appellant does not challenge the sufficiency of the evidence. We, therefore, view the evidence in a light most favorable *523 to the verdict. *State v. Johnson*, 95 S.W.3d 221, 222 (Mo.App. S.D.2003).

Ralph Lape ("Victim") was retired from the Frisco Railroad and had received a lump-sum disability settlement from the railroad in 1997. In 2002, he held a money market account with approximately $117,000 in it and a checking account with approximately $15,000 to $20,000 in it. Victim had been divorced for several years and was living alone on several acres in a modular home. He was selling the property and expecting to close on July 26, 2002. The property had a large garage with a camper inside. A friend of Victim arranged for Mark Gill, who was having money troubles, to live inside that camper. Victim also co-owned a cabin on a lake in Kentucky where he spent the July 4, 2002 holiday weekend with some friends. The holiday weekend ended on July 7, 2002, and Victim's friends and family did not see him after that date.

After the holiday weekend, Mary Cates, the wife of the other co-owner of the Kentucky property, noticed that Victim had stopped returning her phone calls, so she contacted Victim's sister, Diane Miller. Cates also spoke to Gill about whether he had seen Victim since the July 4 weekend. Gill told Cates that Victim had returned on Sunday but left the following morning. Gill attempted to return the keys to Victim's house, but Cates suggested he should stay so there was someone at the house in case Victim tried to contact Gill.

On July 22, 2002, after Victim's friends and family had noticed that Victim was still absent and not returning phone calls, Victim's daughter, Megan, and his ex-wife went to Victim's house. After knocking several times, Gill answered the door and Megan could see Appellant sitting on the couch drinking a beer. Gill told Megan and Victim's ex-wife that Victim had gone to Kentucky Lake and had hired Gill and Appellant to move his belongings because he was selling the house. Before Megan left, she noticed that the kitchen and bathroom were filthy and that there was mud and ash in the bathroom tub. This was unusual to Megan because Victim was usually very neat and clean.

On July 23, 2002, Victim's brother-in-law, Mitch, went to Victim's house. When Mitch arrived he saw Gill and Appellant standing at a burn barrel near the back of the property. Mitch noticed the house had been cleaned, except for some mud and ash residue in the bathtub. Mitch also noticed that Victim's 357 magnum single action revolver and a single action 22 revolver were missing from Victim's gun cabinet and bedroom.

When Victim did not return, Diane decided to report him missing the day before the scheduled closing on Victim's house. Diane also began collecting

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Victim's mail. This led Victim's family and the police to become aware that Victim's ATM card was being used. Video of the ATM withdraws showed that Gill had been using Victim's credit card. Credit card and bank statements showed that Victim's internet banking service was used to transfer $55,000 from his money market account to his checking account, and there had been ATM withdrawals made in Illinois, Kansas, Arizona, Wyoming, Colorado, Utah, Nevada, and New Mexico. Gill was arrested on July 30, 2002, not far from a New Mexico gas station, driving his girlfriend's car. Police found Victim's ATM card as well as $400 in cash. Police also found .357 magnum rounds in the car and a 357 revolver wrapped in a white t-shirt and hidden in the jack assembly compartment in the trunk.

Also on July 30, 2002, police interviewed Appellant by phone. Appellant said that he had not heard from Gill since Tuesday or Wednesday of the previous week when *524 he was helping Gill move items from Victim's garage. Appellant said that he had never met Victim. Later that day, police interviewed Appellant again at his girlfriend's house. Appellant detailed his relationship with Gill and stated that the last time he saw Gill was July 25, 2002.

Appellant was interviewed at the police station on July 31, 2002. After waiving his *Miranda*[FN2] rights, Appellant told police that he had gone to visit his mother in Portageville on July 4, 2002, and spent all of July 5, 2002, with his girlfriend. Appellant said that he and a friend went to visit Gill at Victim's home on July 6, 2002, and that Gill came to Appellant's house on July 7, 2002, to ask if Appellant wanted to go to St. Louis. Appellant told Gill that he did not have any money, but Gill told Appellant that he would cover him. On the way to St. Louis, Gill gave Appellant an ATM card and a PIN and had Appellant get cash from an ATM at a convenience store in Herculaneum, Missouri. Appellant and Gill then went to a strip club in East St. Louis, Illinois, and then stayed at the Adams Mark Hotel. Gill tried to buy shoes at the mall using Victim's card, but he was not able to because he did not have photo identification. After the interview, the investigators allowed Appellant to leave.

FN2. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The next day, August 1, 2002, investigators interviewed Appellant again and administered a polygraph examination. The investigator was told Appellant was a suspect in using Victim's ATM card and possibly involved in disposing of Victim's body; the investigator drafted questions for Appellant that addressed those issues. Appellant admitted that he had lied to the investigators the day before. At that time, one of the investigators told Appellant that if he was truthful and all he did was help dispose of a body, there was a good chance the prosecutor would be willing to work with him regarding the charges. Appellant wanted to talk to the prosecuting attorney, however, the investigators said they would need some information to show that Appellant knew more than what he had already shared. Appellant told the investigators they should stop looking for Victim's body in Kentucky Lake. The investigators called the prosecuting attorney, who made an agreement with Appellant to only charge him with misdemeanor tampering with evidence if Appellant "[was] not involved in the killing," provided a complete statement as to everything Appellant knew about the murder, and helped the officers find Victim's body and his truck.

After signing the agreement, Appellant directed investigators to a cornfield in Portageville, Missouri, where Appellant said Victim was buried. Appellant also directed investigators to East Cape Rock Park along the Mississippi River where Appellant said Gill had thrown the pistol in the river. When they returned to the police station, Appellant made a videotaped statement. In the statement, Appellant said that Gill had come over to his apartment and said he needed help getting rid of a body. Appellant said Gill bound Victim and put him in Victim's truck. Appellant rode with Gill and Victim to the cornfield and Appellant said he saw Victim breath-

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ing while they were on the drive When they arrived at the cornfield, Gill made Appellant start digging and then Gill threw Victim in the hole and shot him once in the head. Appellant stated that afterward, Gill dropped him off at home and the next day they went to St Louis

Appellant made a second videotaped statement on August 2, 2002 In the second statement, Appellant admitted that he *525 had not told the entire truth in the previous video statement. Appellant added that both he and Gill were having money troubles. Gill came to Appellant and said he wanted him to tape Victim up, take him out to the country, and shoot him Appellant admits that he went to the store to purchase the duct tape used in the crime and that he helped bind Victim with zip ties. Before covering Victim's mouth with duct tape, Gill grabbed Victim and got his ATM PIN. Afterward, they took Victim out to the country, they both dug a hole, Gill put Victim in the hole, and Gill shot Victim once in the head

Victim's body was recovered on August 1, 2002, in the location Appellant had directed them to. The cause of death, a small caliber gunshot wound to the head, confirmed the statements made by Appellant. Victim also had contusions to the scalp, trauma to the right jaw area, a skull fracture near the back of the head, a fractured rib, and bruising over a large part of his chest, those injuries were not caused by the gunshot

POINT I

[1][2][3][4] Appellant contends in his first point that the trial court erred in overruling his *Batson* objections to two venirewomen who were struck by the State, he further avers that the State used eight of its nine peremptory strikes against women and failed to strike similarly-situated veniremen[FN3] A defendant can establish a *prima facie* case of discriminatory jury selection by "the totality of the relevant facts" of the prosecutor's behavior during the defendant's trial *Batson v Kentucky*, 476 U S 79, 93-94, 106 S Ct 1712, 90 L Ed 2d 69 (1986) The Missouri Supreme Court set forth a three-part procedure to determine whether a *Batson* violation occurred. *State v Parker*, 836 S W 2d 930, 939 (Mo banc 1992) First, a defendant must challenge one or more specific venirepersons struck by the State and identify the cognizable protected class to which they belong, second, the State must provide a nondiscriminatory reason amounting to more than an unsubstantiated denial of discriminatory purpose, and third, the defendant must show that the State's explanation was merely pretextual and the true reason for the strike was racial[FN4] *Id* A trial court's ruling in a *Batson* challenge is "entitled to great deference on appeal" and will be reversed only if "clearly erroneous" leaving "the definite and firm impression that a mistake was made" *State v Cole*, 71 S.W 3d 163, 172 (Mo. banc 2002) Because weighing the legitimacy of the State's explanation for a peremptory strike is, by nature, a subjective exercise, "we place great reliance in the trial court's judgment" *State v Morrow*, 968 S.W 2d 100, 114 (Mo banc 1998)

FN3 Appellant has a separate complaint in his first point, which appears to challenge the court's denial of an overnight recess to enable defense counsel to ensure all the issues presented by the challenges were covered and to demonstrate their pretextual nature; however, we see no merit to his claim in that the trial court allowed defense counsel to supplement the record after a weekend of reviewing the record and prior to the trial. Thus, we decline to review any claim concerning the denial of a recess

FN4 *Batson* has been extended to prohibit peremptory strikes on the basis of gender. *State v Williams*, 24 S W 3d 101, 120 (Mo App W D 2000).

[5] Appellant first argues that the trial court erred in overruling his objection to the State's peremptory strike of venirewoman Cheryl Stapleton, who was struck by the State because "she could not be the

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foreperson to sign a death verdict form. She had written that the death penalty was only appropriate in the most extreme *526 cases on her jury questionnaire, and she had indicated in the verbal discussion at the Bench yesterday that she has been on antidepressants in the past." Appellant argued that similarly-situated male venirepersons were not struck and that several men who actually served on the jury demonstrated responses like Stapleton's. Because the State was seeking the death penalty, we shall address Appellant's contention that the strikes were pretextual because similarly situated males had similar views on the death penalty.

Appellant argues that one such male juror, Norris McHeffey, required a hearing aid to participate in the process and had stated in his juror questionnaire that the death penalty was appropriate "if proven guilty." Likewise, Appellant contends that James Robert Adams stated that whether he could impose the death penalty would depend on the facts of the case. He could impose death "If I believed beyond a shadow of a doubt he deserved it, I would have to choose so." Appellant claims that three other jurors, John Wolf, Todd Faubion, and Raymond Jennings, had similar concerns about the death penalty. Wolf's response in the questionnaire was "I am not against it, but I'm not for it. Everyone should be punished for their crime. The more severe crime, the more severe punishment." Faubion stated, "I believe that the death penalty is of course the most highest [sic] punishment. It is a penalty that needs to be taken seriously were [sic] only a few trials should even be considered with this punishment. There are some crimes that are com[m]itted that might need the strongest form of punishment." He stated, "[t]he death penalty is the most strongest [sic] sentence & I feel it would take something very bad to vote for it but if I felt it were appropriate I would vote for it." Jennings stated that the death penalty "should apply for some but not for all."

We find all of the statements of the venirepersons to be thoughtful, honest, and insightful about their feelings toward the imposition of the death penalty. It is hardly surprising that each felt that the imposition of the death penalty required serious deliberation for a serious crime about a defendant that each felt was certain had committed that crime. We should expect no less from our jurors. The difference between the responses listed above and Stapleton's response was that even given the very serious and extreme situations in which the death penalty might be appropriate, on a personal basis she could not be the foreperson to sign a death verdict. That may have signaled to the prosecutor more than a conscientious effort to seriously deliberate the imposition of the death penalty in this particular matter. That alone might not differentiate Stapleton from the other venirepersons but when added to the State's given reason that Stapleton had been on antidepressants in the past and the fact that he had worked on a case where a juror had a "mental episode" during the trial, we find the State proffered a reasonable and gender-neutral ground for striking Stapleton.[FN5]

> FN5. In doing so, we reject Appellant's claim that a venireperson with a hearing aid is similarly situated to a venireperson with "nervousness" during the trial and past mental health issues.

[6] The second venireperson who Appellant claims was stricken for improper motives was Adrienne Cooker. She stated that while in the military she had attended special training in "Sexual Assault Victim Advocacy." She also stated that both the death penalty and life in prison should be carefully considered as potential punishments but her views on the death penalty would not prevent or substantially impair her ability to impose that sentence. She *527 would seriously consider imposing a death sentence, after looking at the facts and the law. Since behavior patterns are important, if a person lacked a history of violence, she would be more likely to lean toward a life sentence.

Appellant claims the State struck Cooker because of her questionnaire responses, because "she had been a sexual assault victim and, [because] al-

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though she believed the death penalty was necessary in some cases, if the defendant had no history of violence, she would lean toward life." Appellant mistakenly argues that the State's strike of Cooker was pretextual because Cooker was not the victim of sexual assault as the State had argued, she had only received sexual assault training. As the State notes, Cooker told the judge and both attorneys at a bench conference during voir dire that she had been sexually assaulted seven years before trial. While lack of support from the record may indicate pretext, that is not the case here.

Furthermore, the State actually argued that being the victim of a sexual assault would normally make her a good juror for the State, but because Appellant did not have a history of violence, the prosecutor believed her response to the questionnaire indicated venirewoman Cooker would have a problem imposing the death penalty in that case. The prosecutor articulated a reasonable, gender-neutral justification for striking Cooker. Given the totality of the circumstances-that this was a murder case involving a crime against a man by a man, that there were no real issues tied to gender, and the jury ultimately rejected the death penalty-we find the trial court did not err in denying Appellant's claim that Stapleton and Cooker were improperly stricken because of their gender. Point I is denied.

POINT II

[7] Appellant avers in his second point that his statements made to the police after a deal was entered into with the prosecutor should have been suppressed at trial because of the "promise of lenency" by the prosecutor. The letter from the prosecutor on which Appellant claims to have relied is as follows.

Dear Mr. Brown:

I am writing to confirm the promises I made to you over the telephone a few minutes ago. I would like for Detective Don Perry to read this letter aloud to you and for both of you to sign it when he is finished reading it. You may keep a copy of the letter.

My understanding from talking with the investigators is that you were not involved in the killing of Ralph L. Lape, Jr., but that you may have been involved in the disposal of the body and/or other evidence, as well as some use of Mr. Lape's ATM card or other assets. The promises I am making you are based upon the fact that you were not involved in the killing. If it turns out that you were the killer, all deals would be off.

I promise that if you give a full and complete detailed written and taped statement as to everything you know about the killing of Ralph L. Lape, Jr., and the disposal of his body, and the disposal of his truck and/or other evidence, and if you help the officers recover the body and any other evidence of which you are aware, I agree that the only crime I will charge you with is the class A misdemeanor of tampering with evidence. The maximum punishment for the misdemeanor of tampering with evidence is one year in the county jail. I would further agree that you would not be sentenced until after the trial(s) of the person or persons who committed the murder, so that the judge who decides*528 what amount of county jail time you would receive, if any, would know all about your full cooperation with the police and the prosecution.

It is absolutely imperative that you tell the investigators the complete truth now, because a prosecutor cannot use perjured testimony. Everything you tell us now must be the complete and detailed truth. I cannot have you tell us something now and then find out later you were lying. If you lie to us now, this deal would be off.

I appreciate your willingness to tell the complete truth and you have my word that I will honor the promises made in this letter.

[Signed by H. Morley Swingle, Prosecuting At-

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torney]

To restate the bargain, the prosecutor agreed to charge Appellant with a class A misdemeanor if Appellant was not involved in the killing of Victim but was only involved in the disposal of the body or other evidence and used Victim's ATM card or other assets. Furthermore, Appellant agreed to give a "full and complete detailed written and taped statement" as to everything Appellant knew about the killing and disposal of Victim's body. The prosecutor reiterated at the end of the letter, after a discussion of the necessity of telling the complete truth and perjured testimony, "[i]f you lie to us now, this deal would be off." The issues are whether Appellant was involved in the killing of Victim or whether Appellant lied to the police subsequent to the signing of the deal. The answer is "yes" to both questions

Appellant did not simply dispose of Victim's body, he was there and participated when Victim was killed. Prior to the murder, Gill came to Appellant and said he wanted to get Victim, "tape him up," take him out to the country, and shoot him. Appellant went to the store and bought duct tape to use in the crime. When Victim entered his own home, Appellant helped bind Victim with pull ties or zip ties. Appellant knew Victim was alive on the trip to the country as he could see his stomach moving up and down and he then participated in digging Victim's grave. Clearly, Appellant was a participant in the murder of Victim.

Additionally, Appellant lied to the prosecutor in his first statement after the deal was struck. Appellant first said that Gill had come to Appellant's house and said he needed help getting rid of a body and threatened to kill him if he did not help. He claimed that Gill already had Victim tied up in the truck and that he had never met Victim. In his second statement, he admitted that his prior statement did not include all the facts and he had not told the complete truth. At that time he said that both he and Gill were having money troubles. That is when he admitted that Gill had come to him with the murder plan. He claimed he was "sketchy" about the plan at first but then said all right. The second statement was when he admitted that he had bought the duct tape and was present during the entire murder.

[8][9][10] The due process clause forbids convictions based in whole or in part on an involuntary confession. *State v. Clements*, 789 S.W.2d 101, 105 (Mo.App. S.D.1990). "The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of free choice to admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that defendant's will was overborne at the time he confessed." *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). We review the trial court's findings, however, to determine whether substantial evidence supports the trial court ruling. *529*State v. Vinson*, 854 S.W.2d 615, 621 (Mo.App. S.D.1993). In determining the sufficiency of the evidence, the facts and reasonable inferences are taken in the light most favorable to the order challenged on appeal. *State v. Blair*, 691 S.W.2d 259, 260 (Mo. banc 1985). We are not left with a definite and firm belief that a mistake has been made. *See State v. Eshnaur*, 106 S.W.3d 571, 574 (Mo.App. W.D.2003). We find substantial evidence supports the trial court in that there was no coercion in the proffer of leniency and there is no allegation that the interviews were coerced in any other way.

At the time of the negotiations, neither the prosecutor nor the police knew to what extent Appellant was involved, if at all, in the murder of Victim. The letter and the conversations were clear that Appellant must not have been involved in the actual murder of Victim and that he had to be truthful. He was neither. Only Appellant knew to what extent he was involved. He was given full warning in the *Miranda* warnings and by the prosecutor's letter that his statements would be used against him and he would be charged with murder if he was involved in the actual murder or if he lied in his statement to the police. Point II is denied.

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POINT III

[11] Appellant claims in his third point of error that the trial court erred in submitting an instruction which attributed the conduct element of shooting Victim to Appellant *or* Gill and instructed the jury that Appellant "acted together with" Gill Specifically, Appellant is arguing that "if conduct elements are committed entirely by another person, all elements [should] be ascribed to that person, not the defendant" and the jury should be instructed to determine whether the defendant "aided or encouraged" that other person and not "acted together with" the person. Appellant mistakenly relies on the "fact" that was introduced into evidence that Gill pulled the trigger Simply pulling the trigger is not the only conduct element in this particular first-degree murder case The use of the disjunctive with regard to the criminal actor and the use of the instruction "acted together with" both turn on an analysis of the evidence relating to the conduct elements of the crime, so they will be examined together

The use of a disjunctive instruction, and the use of the "acted together with" instruction, has been previously addressed by this Court in *State v Purl*, 236 S W 3d 680 (Mo App. S D 2007)

> A person is criminally responsible for the conduct of another when "he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense" Section 562 041 1(2) "The central tenet of accomplice liability is the notion that all who act together 'with a common intent and purpose' in committing a crime are equally guilty" *State v. Biggs*, 170 S W 3d 498, 504 (Mo App W D 2005) (quoting *State v Copeland*, 928 S W 2d 828, 847 (Mo banc 1996)) Instructions made in the disjunctive are often used in cases of accomplice liability because as MAI-CR 3d 304 04 Notes on Use 4, has noted "[t]here are almost an infinite number of variations in factual situations of accessorial liability." Instructions must be supported by substantial evidence and reasonable inferences to be drawn therefrom *State v Howard*, 896 S W 2d 471, 492 (Mo App. S D 1995) Clearly, disjunctive submissions of alternative means by which a single crime can be committed is proper only if the alternative submissions are each supported by the evidence *Puig*, 37 S W 3d at 377
>
> *Id* at 685

The instructions in this case were based on MAI-CR3d 304.04 and the Note on Use *530 5(b) These sources indicate that when the defendant and another person are joint actors in committing the conduct of an offense, the elements in the verdict director may be ascribed to the defendant alone, to both the defendant and the other person, or to the defendant or the other person Note 5(b) also gives directions on selecting the "acted together with" language This Court determined that acting together with "means that the Defendant by his own acts committed some or all of the conduct elements of the offense" *Puig*, 37 S W 3d at 377 Further, under this Court's analysis in *Purl*, we determined that in order to support an "acted together with" instruction the defendant must complete essential conduct in the underlying crime *Purl*, 236 S W 3d at 687, *see generally Puig*, 37 S W 3d at 377 (where this Court found the defendant did not commit a conduct element of the crime when he was already present at a location before the crime took place and did not provide conduct essential to the completion of the crime), *but see Biggs*, 170 S W 3d at 504-05 (where the defendant was found to have provided a conduct element after he provided the weapon for the robbery and drove the get-away car)

Therefore, the jury instruction given in this case is appropriate if the evidence supports a finding that Appellant and Gill were joint actors, meaning that there is evidence to support each of the alternative theories that Gill or Appellant committed the conduct acts and the evidence is clear that Appellant committed at least some conduct elements of the offense

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Appellant argues that the disjunctive instruction is in error because the only evidence presented at trial indicates that Gill was the shooter There are more conduct elements in a murder than simply pulling the trigger Appellant heard and concurred in the plan to murder Victim prior to the murder Appellant bought the duct tape. Appellant was present when Victim was bound; apparently, there was a struggle at that time because of the other injuries on Victim indicating there was plenty of time to deliberate on the crime Victim was still alive on the way to the country, which allowed more time for deliberation Appellant was present at the scene of the actual pulling of the trigger. Under our *Purl* analysis, he acted together with Gill even if he did not physically pull the trigger. Factually, it is clear that Appellant committed a conduct element of the crime.

Furthermore, it was appropriate to submit the verdict directors in the disjunctive because the evidence was not clear as to all conduct elements of the crime Appellant is incorrect that the only evidence regarding the shooting was that Gill did it Appellant made several statements to police, at one time denying any role in the murder itself Appellant later admitted that he rode with Gill to dispose of Victim's body and, finally, in a fourth statement to police, Appellant admitted all of his participation in the murder Although in each of these statements Appellant denied being the shooter, the statements were inconsistent overall. Each of these inconsistent statements was presented at trial, which brought his credibility in issue, and, as a result, the jury could not be bound by Appellant's claim that it was undisputed that Gill was the shooter or the prosecutor's statements that Appellant was not the shooter. *See State v Gill*, 167 S W 3d 184, 191 (Mo banc 2005) (where Gill claimed Appellant was the shooter, the court found the self-serving and inconsistent statements of the defendant, combined with Gill's extensive admitted involvement in the murder, supported a jury instruction indicating the evidence was unclear) Victim also had additional injuries that were not explained by Appellant at all Appellant provided many accounts of *531 the crime, it was up to the jury to determine which were true Since the evidence presented supports each of the alternative theories presented by the disjunctive instruction, it was appropriate to present the instruction in the disjunctive

[12][13] We find that the verdict director on first-degree murder, which was modeled after MAI-CR3d 304 04 and Note 5(b), was the proper MAI instruction and was supported by the evidence Our review of Appellant's claim of insufficient evidence to support the given instruction is limited to determining whether sufficient evidence was admitted at trial from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt. *State v Chavez*, 128 S W 3d 569, 573 (Mo App W D 2004) We do not reweigh the evidence, but determine if the conviction is supported by sufficient evidence *State v Mann*, 129 S W 3d 462, 467 (Mo App S D 2004) Point III is denied

POINT IV

[14] Appellant claims prosecutorial misconduct in questions and comments during voir dire, opening statement, and closing argument Appellant argues that the prosecutor's "repeated, intentional misconduct violated [Appellant's] state and federal constitutional rights to due process, a fair trial, reliable sentencing and freedom from cruel and unusual punishment." The State alleges that Appellant raises at least four different types of alleged prosecutorial misconduct and the point is not properly presented for appeal Although, arguably, each of the claimed misconduct by the prosecutor should be analyzed under a different standard of review and should be the subject of a separate point of review, Appellant lumps them together as a pattern of misconduct and then states the trial court should have *sua sponte* declared a mistrial. The State is correct that Appellant's brief violates Rule 84 04 [FN6] by raising multifarious claims We shall review Appellant's claims for plain error only

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FN6. All rule references are to Missouri Court Rules (2007), unless otherwise specified.

The first claimed misconduct is the reference to "they" when referring to the shooting of Victim in both opening statement and closing argument. Appellant argues that it was undisputed that the shooter was Gill. He claims the argument that the jury could consider as evidence that Appellant deliberated, that Appellant and Gill had "armed themselves with guns," and that Gill had gotten Victim's bank PIN number before his mouth was taped was improper.

The second claimed misconduct was the prosecutor using a chart, denominated "deliberation," that purported to set forth the applicable law and facts. Appellant claims the chart improperly advised the jury to consider as evidence of Appellant's deliberation the actions of Gill. Among the factors that the prosecutor asked the jury to consider were actions, including lies, told after the murder to show deliberation. Appellant claims that telling the jury that actions taken after the killing constitute deliberation misleads them and lessens the State's burden of proof on that essential element of the offense.

Finally, Appellant claims that the prosecutor acted improperly when he supposedly "bent over, and like he was kneeling down on the floor" when describing the trajectory of the gunshot wound as being consistent with someone who is kneeling down in a grave while someone above is firing a gunshot down. Appellant claims that the prosecutor acting out what happened turned himself into an unsworn witness,"532 who was not subject to cross-examination and encouraged the jury to put themselves in Victim's position of kneeling down prior to being shot.[FN7]

FN7. Appellant also argues that the prosecutor injected facts that were not in evidence into his closing argument by referencing a comparison to Jesse James. Appellant did not object to the comment nor include it in his point relied on, therefore, we will not address it.

[15][16] Prosecutorial misconduct is unconstitutional when it so infects the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. De Christoforo*, 416 U.S. 637, 642-43, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Argument may not be so outrageous as to violate due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8th Cir.1989). We find, when reviewing the specified incidents, either individually or cumulatively, that there is no constitutional violation and Appellant was not deprived of a fair trial.

[17][18][19] We note that any alleged misconduct, alone, does not warrant reversal of an otherwise valid conviction. *U.S. v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Even conduct that is "undesirable or even universally condemned" does not warrant reversal unless it "so infected the trial 'with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). "The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted." *State v. Weaver*, 912 S.W.2d 499, 512 (Mo. banc 1995). Given the broad discretion the trial court has regarding comments during the opening statement and closing arguments, we find no error in overruling an objection to the plural pronoun in describing the actions that led to the murder of Victim. Clearly, the State's position was that both Gill and Appellant participated in the murder of Victim. Even Appellant used the plural pronoun, "we," when describing various actions taken during the crime. He said "we pull tied him up and duct taped him and put him in, inside the truck." He then added "We leave. We leave. We get on 55 south and we proceed down to Portageville" and "we digging a hole." He further contended that "we cut, cut all the duct tape, the clothes, shoes . off and

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put it all in a bag" after Victim was shot.

As for the deliberation chart, the prosecutor argued facts that he believed supported an inference of deliberation. He tried to tie together the participant's motive for the murder of lack of money to the behavior after the death in spending the money, hiding the weapons and other evidence and lying about what had occurred. Even the claimed physical actions of the prosecutor mimicked the actions shown in Appellant's confession video. We find none of Appellant's complaints about the prosecutor's conduct are valid nor rise to the level of prosecutorial misconduct. We are not left with any conviction that Appellant was deprived of a fair trial. Point IV is denied.

POINT V

[20] Appellant's final complaint is that an African-American venireman was excused for hardship when he stated that he had been on pain medication for two years, had had eight ankle surgeries, and had a doctor's appointment for surgery the following Monday of trial. Appellant contends that the venireman agreed that he could concentrate and listen to the evidence and his pain level and condition *533 would not worsen were he to delay his doctor's appointment.

We review the trial court's action for an abuse of discretion. *State v. Zink*, 181 S.W.3d 66, 73 (Mo. banc 2005). In the process of asking the venire about any serious hardships, venireman Roosevelt Williams stated he was scheduled for ankle fusion surgery the following Monday and he could not be re-scheduled for another three months. He stated he is always in pain, despite taking the pain medications. Despite Appellant's claims that the venireman was not an appropriate person for a hardship determination, we shall defer to the trial judge, who was able to observe the venireman and hear his responses. Point V is denied.

The conviction is affirmed.

LYNCH, C.J., and SWEENEY, SR.J., concur.
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IN THE CIRCUIT COURT OF NEW MADRID COUNTY
STATE OF MISSOURI

MARK ANTHONY GILL,	)	
	)	
Movant,	)	
	)	Case No. 05NM-CV00799
v.	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this 8th day of October, 2008, the Court, after evidentiary hearing, hereby denies Movant's Motion to Vacate, Set Aside or Correct Judgment, specifically making the following findings of fact and conclusions of law:

1. A New Madrid County jury found Movant guilty of first degree murder (Count I), kidnapping (Count II), armed criminal action (Count III), robbery in the first degree (Count IV), and tampering with a motor vehicle (Count V) in March of 2004 in Case No. 02-CR-754906. The jury recommended the death penalty for the first degree murder.

2. On April 19, 2004, Circuit Judge Fred Copeland sentenced Movant to death for the murder charge. He also sentenced him to 15 years for kidnapping, 30 years for armed criminal action, life in prison for first degree robbery, and 7 years for tampering with a motor vehicle, with all sentences to run consecutively.

3. Movant's convictions were subsequently affirmed on appeal in a unanimous decision by the Missouri Supreme Court. *State v. Gill*, 167 S.W. 3d 184 (Mo. banc 2005).

4. In this proceeding, Movant attacks his convictions by motion under Rule 29.15,

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claiming that his attorneys, Sharon Turlington, David Kenyon, Jeffrey Estes and Delores Berman, rendered him ineffective assistance of counsel at his trial. He also claims the prosecution violated his constitutional rights by failing to disclose exculpatory evidence.

5. The burden of proof is on the Movant, who has the burden of proving his claims for relief by a preponderance of the evidence. Rule 29.15(i).

6. To be entitled to relief based upon ineffective assistance of counsel, Movant must plead and prove two related but independent issues. First, he "must show that counsel's representation fell below an objective standard of reasonableness." *Byrd v. State*, 723 S.W.2d 37 (Mo. App. 1986), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674, 693 (1984); *Seales v. State*, 580 S.W.2d 733 (Mo. banc 1979). "Second, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different, *i.e.*, the defendant has been prejudiced by counsel's deficient performance." *Byrd*, 723 S.W.2d at 38; *Strickland*, 466 U.S. at 693; *Seales*, 580 S.W.2d at 736; *Aaron v. State*, 81 S.W.3d 682 (Mo. App. W.D. 2002); *Bucklew v. State*, 38 S.W.3d 395 (Mo. banc 2001); *Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001).

7. The proper standard for attorney performance is that of reasonably effective assistance. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under the prevailing professional norms. *Strickland v.*

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Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

8. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 80 L.Ed.2d at 694.

9. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 80 L.Ed.2d at 694.

10. "Because of the difficulties in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy." *Strickland*, 80 L.Ed.2d at 695. There is a presumption that the decisions made by trial counsel were matters of trial strategy and Movant must present evidence to rebut and overcome that presumption. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996).

11. The hearing on this case was held in Cape Girardeau County by agreement of the parties, and for the convenience of the witnesses.

12. Movant requested a writ so that he could appear, which the Court initially

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signed. Upon the request of the State, the Court reconsidered the writ and because of security concerns, the Court rescinded the writ over Movant's objection. The State indicated that it would cooperate in scheduling Movant's deposition if he wished to testify, but it appears Movant has not offered any testimony on his own behalf.

13. The case was called on June 16, 2008. Movant appeared by counsel, Loyce Hamilton and Robert Lundt. The State appeared by Assistant Attorney General Theodore A. Bruce. At the request of Movant, the Court took judicial notice of the entire file of the underlying criminal case, including transcripts.

14. Movant's primary claim is that had his counsel accessed, and used, evidence that there was child pornography and incestuous "chats" on the victim, Ralph Lape's, computer, the outcome of the trial would have been different.

Movant claims this "evidence" was relevant and admissible for a number of reasons. As the Court will set forth in more detail below, the Court finds that this information was not exculpatory, the prosecutor did not fail to disclose exculpatory information, and most important, that Movant's theory as to why it was relevant is a complete fabrication created by Movant to somehow make this information relevant.

Movant's co-defendant, Justin Brown, had access to this "evidence" before trial, but was not allowed to use it based on a Motion in Limine. Mr. Brown's conviction has been affirmed on appeal. *State v. Brown*, 246 S.W.3d 519 (Mo.App., S.D. 2008). As will be set forth below, this Court believes such evidence is generally not admissible. In addition,

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Movant failed to establish that Mr. Lape was the individual who wrote the messages or downloaded the pornography.

Nevertheless, Movant makes the creative argument that he could have used this information about Mr. Lape as "leverage" to limit the victim impact evidence presented by Mr. Lape's family. In fact, he argues that is what happened in Mr. Brown's case and that is why Brown did not receive a sentence of death.

Movant suggests that the testimony of the victim's family "changed" between the Movant's trial and Justin Brown's trial. Movant further suggests that this is due to the fact that Justin Brown's attorneys had this evidence of information on Mr. Lape's computer which restricted the scope of the victim impact evidence. Movant then wishes this Court to infer that is the reason Mr. Brown's jury did not recommend a sentence of death.

a. There are differences in the testimony between the two trials. For example, in the Movant's trial, the victim's sister, Diane Mitchell, testified about her father in more detail. One of the factors was that Movant and Brown used Ms. Mitchell's and Mr. Lape's father's war records to ignite their bloody clothes to hide the evidence.

b. One difference is that in the Movant's trial, Ms. Mitchell was allowed to read a prepared statement. In *Brown*, the judge exercised his discretion in not allowing the witnesses to read statements. The Court believes this explains much of the difference between the two trials in terms of the testimony presented.

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c. In addition, the Court does not believe the testimony offered in Movant's case, even if offered again, would have "opened the door" to evidence of the victim's "bad character."

d. The prosecutor did not help the witnesses prepare their witness statements or the content of the statements. Therefore, the prosecutor did not "tailor" the statements. The issues were different, to some extent, in the two cases. For example, in the Movant's trial, the defense made reference to the allegation that Mr. Lape had used a racial slur in referring to Movant. In response, the State presented evidence that Mr. Lape had been kind to a mixed-race child. The defense in *Brown* did not use the evidence of the racial slur, so the State did not present the evidence of Mr. Lape's interaction with the child. This is to be expected since Mr. Brown's attorneys could not reasonably expect the racial slur to have much impact in his case.

In addition, the Court does not believe that Movant's trial attorneys were ineffective in failing to anticipate or investigate the content of Mr. Lape's computer with the idea that there might be evidence in the computer to damage the victim's reputation. First, the Court does not believe that it is reasonable to presume or assume that someone will have pornography on his computer—or any other "evidence" to impeach the victim's character. The constitutional requirement is that counsel exercise the degree of skill that a competent attorney would exercise. This review, undertaken in this case, is not intended to be an opportunity to second-guess the judgments of the attorneys, but to decide if their representation was competent.

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The Court does not believe this type of evidence is the type that courts require an attorney to anticipate, for two reasons. First, such evidence is unlikely and not to be expected. Second, this information—even if discovered—is of such tenuous value that it is not reasonable to require an attorney to make such a search.

15. "Reverse victim impact" evidence has by no means been established by the courts to be relevant or admissible. The United States Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), allowing victim impact evidence does not necessarily allow a defendant in the penalty phase of trial to impugn the victim's reputation. In fact, the purpose of the victim impact evidence is not to focus on the victim's character; it is intended to show the impact the victim's death had on the survivors.

Since the penalty phase of the trial cannot, in Missouri, digress into a comparison of the value of the victim's life and the defendant's life, *State v. Johnson*, 22 S.W.3d 183, 190 (Mo. banc 2000), the relevance "that the victim's personal life was less than ideal," *State v. Powers*, 101 S.W.3d 383, 403 (Tenn. 2003), is dubious.

It may be that a court might find such evidence in a particular case admissible. This Court does not foresee such a circumstance. But counsel for either the prosecution or the defense could not reasonably expect or anticipate that this "evidence" would be of any significance in the guilt or penalty phase.

Both Ms. Turlington and Mr. Kenyon testified that they could not ethically argue that Mr. Lape's life had less value even if they had evidence that he might have been a pedophile.

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This is not proper argument, and it is not proper argument because that should not be a basis for the jury's decision. Yet, in essence, Movant wants to present this evidence with the hope that the jury will, in fact, improperly consider it in the very way that it should not be considered. This is not a legitimate hope and this Court does not believe "reverse victim impact" evidence has any place in the criminal process.

16. Sean Goliday testified by deposition and his testimony was admitted without objection by the State. Mr. Goliday was an investigator for the Public Defender's Office in the Capital Litigation Division. He was assigned to assist in the defense of the Movant. He had received training in mitigation investigation. He worked on approximately 30 capital cases in his four and one-half years in the Public Defender's Office. He was a well-qualified investigator with an extensive background in sociology, including a master's degree in sociology in 2001.

Ms. Bowman and Mr. Estes were the attorneys originally assigned to the case. The attorneys were hoping to get a plea deal from the prosecutor in exchange for information Movant had on attorney Pat Davis. After they left the office, Sharon Turlington and David Kenyon were assigned to the case. Mr. Goliday's duties in Movant's case were typical—collecting records and contacting potential witnesses.

Mr. Goliday gathered a great deal of information—information that was used by trial counsel in preparation for trial. He was knowledgeable about his purpose and role. His role was not to interview witnesses, but to arrange interviews. Thus, the fact he did not interview

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certain witnesses whom Movant claims should have been interviewed is not surprising.

17. Movant called his cousin, Derrick Fitzgerald, as a witness. He grew up in Portageville, as did Movant. Mr. Fitzgerald describes a family that could easily be described as dysfunctional. While he shared certain details that were not contained in other reports or testimony, the testimony was not significantly different from the general picture the Movant's trial counsel presented to the jury.

His testimony concerning the alleged sexual abuse of Movant by Dwayne Frazier is inconsistent and lacking in credibility. He testified that he spoke to Movant about the abuse at the age of 14; yet, he told Cecilia Alfonso that this occurred at age 12 (Movant's Exhibit 83, p. 5). Frankly, the testimony, when presented by this witness, was not very compelling or persuasive, in spite of the shocking nature of the allegations. He laughed very inappropriately when discussing some of the alleged details. He seemed to find some of the Movant's conduct amusing and the Court believes this witness would not have been helpful at all.

Other testimony by this witness would definitely <u>not</u> have been helpful to Movant. The description by Mr. Fitzgerald that Movant got "meaner" as a teenager and as he got older is not the type of testimony that would be helpful. He also testified that he has not had contact with Movant since Movant went into the Navy.

Trial counsel was not ineffective in failing to call this witness at trial.

18. Movant called Cecilia Alfonso, a licensed clinical social worker from New

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York, who asserts that she is a mitigation expert. While it is evident that she earnestly believes that the information she reports is important, the testimony was less than compelling. She also got some details she thought were "significant" completely wrong. She stressed the age of Mr. Gill's father as significant, but testified he was 58 years old rather than 73.

Ms. Alfonso's explanations as to the relevance of Movant's social history tended to be rambling and very difficult to comprehend or understand. Ms. Alfonso clearly thought what she said is important, but it was not very clear to this Court why she thought it was important. Ms. Alfonso repeatedly said "this is important" before relating an event—or alleged event—that did not offer any compelling information that any reasonable jury would see as mitigating or otherwise relevant.

The law does not require a defense attorney to hire a "mitigation expert." This witness is not a mitigation expert, and her testimony was nothing more than relating hearsay statements from Movant's family in an ineffective manner.

She testified that Movant had male coaches and teachers who tried to help him and encourage him. She called the military an "alien culture." She testified that Movant told her all he did from 18 to 24 was get drunk and have sex. For a trained social worker, Ms. Alfonso seemed to enjoy using colorful and vulgar language freely without consideration as to the impact her glee at word choices might have on the listener.

Ms. Alfonso opined that Mr. Gill was motivated to kill Mr. Lape because he was

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"suspicious" that Mr. Lape was a pedophile (Exhibit 84, p. 11). This conclusion has very little factual basis and a court would not let the witness offer such a conclusion based on the scant information Mr. Gill allegedly told Ms. Alfonso that Mr. Lape walked around his home in his underwear and that he watched "porno" movies. Ms. Alfonso watched a video involving children and animals that Movant's counsel gave her; but there is no evidence connecting Mr. Lape to this video. In fact, these statements by Mr. Gill to Ms. Alfonso are inconsistent with statements Movant allegedly made to others in preparation for his Motion to Vacate, making Mr. Gill's new theory that he killed Mr. Lape because he was a pedophile even more incredible and unbelievable than it already is.

Again, the Court does not believe that any information this witness proffered would be persuasive, and not significantly different than that provided by other defense witnesses.

19. David Kenyon, Mr. Gill's trial attorney testified. Mr. Kenyon has been trained on investigating and preparing for capital cases and has been involved in approximately 25 capital cases. He and Sharon Turlington entered their appearance on behalf of Movant in June of 2003.

David James was not endorsed by the State as a witness until shortly before the trial and the defense did not feel the need to interview Detective James. Detective James was endorsed on the Second Amended Information, filed February 16, 2004. James did not testify at trial.

There was nothing in the police records, reports, or disclosures that would lead Mr.

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Kenyon, or any other reasonable attorney, to believe it was necessary to depose or interview Detective James. Mr. Kenyon testified that Prosecutor Morley Swingle is well-prepared and that he did not assume Mr. Swingle would fail to endorse a witness he intended to use.

Mr. Kenyon could not articulate how he would have possibly used this evidence that supposedly was on the computer. Mr. Kenyon stated the phrase used by capital defense attorneys is "you do not kick the corpse." There is significant wisdom in that philosophy and the Court does not believe that Mr. Kenyon would have attempted to use this material, and that no reasonable counsel would ever do so.

The claim that the State had some affirmative obligation to automatically produce the entire content of the computer, simply because it was seized, is not true. In fact, Mr. Kenyon testified that he explicitly asked Prosecutor Swingle if there was evidence in the computer that incriminated his client. Thus, he obviously knew he did not have the actual content of the computer, and the Court does not believe a prosecutor is obligated in all occasions to provide the entire content of every computer seized. And that was not the belief of Mr. Kenyon.

The Court finds that even had Mr. Kenyon known about the content of the computer, Mr. Kenyon would not have used this information in an attempt to "kick the corpse." When asked how he would use this information, Mr. Kenyon paused significantly and seemed to be searching for a justification for its use.

20. The Court finds that no competent counsel would have attempted to use the

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scant "evidence" of Mr. Lape's laptop containing certain "chats" and pornography at trial.

First, any competent attorney would know that there was insufficient evidence to establish that Mr. Lape was the author or receiver of this information. In fact, the Court finds that based on the evidence presented by Movant, a trial court would not have permitted this evidence at trial because there is insufficient evidence to establish Mr. Lape was involved in the communications or downloaded the material.

In fact, to have made the allegation would have opened the door to the prosecution presenting evidence that it was Movant who was involved in the "chats" involving discussions of sex. There is no evidence that any such chats occurred prior to Mr. Gill's arrival in Mr. Lape's home. On July 2, 2002, the date of these communications, the evidence was Mr. Lape was out of the home, and on his way to the Lake (Movant's Exhibit 97; Scott Cate depo, pp. 59-60). Movant had access to Mr. Lape's passwords. Movant used Mr. Lape's credit card to purchase several hundred dollars worth of pornographic videos from his satellite dish. There is strong circumstantial evidence that it was Movant, not Mr. Lape, who had these chats about Megan. The evidence is significantly stronger that it was Movant, rather than Mr. Lape.

A jury would not only likely be outraged against Movant and his counsel for making the accusation, but the outrage would likely be made greater by the evidence to suggest Movant himself was actually the source of much of this material.

The Court also finds that the allegation that Movant was somehow "upset" by his

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belief that Mr. Lape was a pedophile is completely incredible and is a transparent creation of Movant after his conviction. Any attempt to make such a claim to a jury would be seen as an obvious fabrication.

During Movant's confessions, he not once stated that his motivation to kill Mr. Lape was anything other than money. In fact, that was Movant's only motivation. He stated in his confession to Sergeant Gregory, on August 2, 2002, that "I sold my soul for $5,000" (Page 25). And rather than suggest Mr. Lape "deserved" to be killed, Movant stated that no one was supposed to get hurt (Page 30). The only information Movant ever provided to his original attorneys, Jeff Estes and Dee Berman, about the killing was that it was supposed to be a robbery, and that Justin Brown was the one who shot Mr. Lape. The evidence is overwhelming that the claim that Movant was motivated by a belief Mr. Lape was a pedophile is a complete fabrication and without merit.

Movant's claim that he observed Mr. Lape viewing pornography is not only refuted by the detailed confessions of Movant, but Movant presented no evidence to support this claim. Movant never said to his trial attorneys, during numerous discussions, that he had any belief that Mr. Lape was a pedophile or that he had seen Mr. Lape view any pornography.

Again, the Court finds that this claim is a complete fabrication and, more important, any jury hearing such a claim would also conclude that such a claim is a complete fabrication and would be angered by the attempt. The evidence is that the material was downloaded once and never looked at again (Swingle depo, p. 30).

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21. Movant presented the testimony of his mother, Alice Gill. Ms. Gill testified at Movant's penalty phase previously. Movant's claim that there was additional information his trial counsel should have elicited from his mother. The Court notes from the outset that it would be obvious to any juror that Ms. Gill was coached. Her testimony is not significantly different from her previous testimony, but she has clearly been instructed how to answer questions to reveal her "insights" into her past.

Ms. Gill's description of the discrimination that existed in her life is undoubtedly true. But Ms. Gill is very unsympathetic as a witness and her testimony offers nothing that a juror would consider as mitigating or in any way relevant to the murder of Mr. Lape by her son.

The photographs and family history would not have had any positive effect upon the jury and the Court does not believe any competent attorney would ever attempt to present such irrelevant material to the jury.

22. In Claim 8(a), Movant makes the allegation that the State failed to disclose evidence in Mr. Lape's computer that was mitigating. While the motivation of the prosecutor is not relevant to whether a *Brady* violation occurred, the Court does find that the prosecutor did not attempt to withhold any information from the defense.

The State did disclose the contents of the computer, sending the Encase report on February 4, 2004 (Exhibit 15, pp. 5125-5130). The prosecutor stated that he did not believe there was anything of relevance on the computer (Swingle depo, p. 90).

The first that the prosecutor knew there might be child pornography on the computer

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is when—following Movant's trial—co-defendant Justin Brown's attorney asked for an actual copy of the contents (Swingle depo, p. 36). It was then that Detective James told Mr. Swingle that there was some child pornography (Swingle depo, p. 36).

In the Justin Brown case, the evidence was fully revealed prior to trial but was excluded and ruled irrelevant (Swingle depo, p. 46).

As the Court has stated in more detail, above, the evidence was not exculpatory and had the defendant had this information it would not have changed the outcome of the trial.

In general, the character of the victim is never relevant, except in cases of self-defense. *State v. Isa*, 850 S.W.2d 876, 895 (Mo. banc 1993). In a death penalty case, a trial court has the discretion to admit evidence it deems helpful to the jury in determining punishment. *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. banc 1996). The Missouri Supreme Court has already upheld the victim impact evidence in this case. *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005).

23. What Movant proposes offering is what is called "reverse impact evidence;" defense counsel David Kenyon referred to it as "kicking the corpse." While this Court cannot predict with certainty how our Supreme Court will rule on the admissibility of such evidence, this Court believes such evidence is not relevant and is not mandated by the Constitution.

The majority of courts addressing this issue have held such evidence inadmissible. *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003); *People v. Harris*, 118 P.3d 545 (Cal. 2005);

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State v. Southerland, 447 S.E.2d 862 (1994); *Alvarado v. State*, 912 S.W.2d 199 (Tex.Crim.App. 1995); *Hill v. State*, 427 S.E.2d 770 (Ga. 1993).

The presentation of evidence by Mr. Lape's family as to how his death affected them does not then allow a defendant "to disparage the character of the victims in rebuttal." *People v. Harris*, 118 P.3d at 550. "Comparative character analysis" is not proper. *State v. Southerland*, 447 S.E.2d at 867.

Movant tries to suggest that even if he could not have used this evidence, the "threat" of using it would have tempered the testimony of the victim's family during the penalty phase. The Court has reviewed the testimony and sees nothing that would open the door to this evidence.

Again, defense counsel knew of the computer and had discussed the computer and the Encase report, according to Ms. Turlington, prior to the prosecutor sending the Encase report to counsel. Ms. Turlington testified that Mr. Swingle told them there was nothing relevant on the computer. The Court believes that was the prosecutor's honest and accurate assessment.

Second, the Court is convinced, after hearing the evidence and the witnesses, that any jury would be angered by any attempt to denigrate the victim in this case and it would be seen as a transparent attempt to disparage a murder victim. Even if a jury were to believe Mr. Lape was the source of this material—which the Court does not believe to be true and does not believe the Movant established—the jurors would still conclude that the defense was simply trying to focus the jury on the value of the victim's life rather than Movant's

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culpability. Both Ms. Turlington and Mr. Kenyon paused a significant period of time when asked about actually using this material and their responses were half-hearted at best. While generally forthright and honest in their testimony, the Court does not believe either lawyer would have seriously considered introducing this speculative evidence in support of their client.

Counsel was not ineffective in failing to examine the computer.

24. Sharon Turlington testified. Her testimony was generally consistent with that of Mr. Kenyon. She testified that she, too, was aware of the computer Movant stole from Mr. Lape and had been informed by the prosecution that there was nothing of any evidentiary value on the computer. She testified she saw no reason to have the computer examined. She testified that Movant did admit to her that he had used Mr. Lape's computer and that he never stated to her that Movant ever saw any pornography on the computer, suspected Mr. Lape of being a pedophile, or otherwise engage in improper behavior. Her testimony reinforces the conclusion that the allegation that Movant was troubled by Mr. Lape's behavior is a mere post-trial fabrication.

25. Gary Riley testified on behalf of the Movant. He grew up in Portageville and coached Little League baseball teams, where he coached Movant for three years. While he was entirely credible, his testimony would not have altered the outcome of the case. In fact, Mr. Riley testified that Movant told him that he was in trouble because he was "chasing the dollar." This only confirms Movant's sole motivation for the killing was financial.

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26. Movant called Sari Skinner as a witness. Ms. Skinner taught Movant in ninth grade English class. She described him as an average student, but said he was not a problem and a pleasure to have in class. She described him as a leader, social, and, frankly, inconsistent with the description of Movant given by Dr. Cross. Her testimony described a young man much different than what one would expect the victim of sexual abuse to display. Counsel was not ineffective in failing to call this witness at trial.

27. Arzil Skinner, Mrs. Skinner's husband, also testified on behalf of Movant. He was a coach and counselor in Portageville. He did not coach Movant, but was his counselor in school. He described Movant as "always happy," always smiling, enthusiastic, and related very well with teachers and other students. Again, this seems to contradict the conclusions of Dr. Cross. While a credible witness, he presented no evidence that would have altered the outcome in this case and trial counsel was not ineffective in failing to call this witness.

28. Movant called Cathy Luebbering as a witness. She is a "mitigation specialist" for the Missouri Public Defender's Office. She began working on Movant's case in 2005. Ms. Luebbering recited a long list of records she obtained. The Court notes that it is difficult to imagine why time, money, and energy would be spent on much of this material. Among the documents collected were records of relatives of Movant that did not offer any relevant information and, more important, records no one would have ever reasonably expected to produce relevant or helpful information. If it is Movant's claim that an attorney must hire a "mitigation specialist" to access every possible record in order to satisfy the attorney's

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responsibility to his or her client, that claim is denied. Time spent on a case is not the equivalent to time well spent. Ms. Luebbering attempted to explain why this vast array of information is "relevant," but the Court did not find her persuasive at all. Trial counsel was not ineffective for failing to use a mitigation expert to engage in the type of "research" this witness produced.

29. Gheri Rone testified on behalf of the Movant. She was a school teacher for Portageville. She taught Movant and described him as a good student, a leader, well-liked, and happy. Again, this testimony is inconsistent with the suggestions that Movant was being victimized and suffering from post-traumatic stress syndrome. Trial counsel was not ineffective in failing to call this witness at trial.

30. Movant called Dr. Donald Cross, a clinical psychologist, as a witness. Movant asserts that trial counsel was ineffective for failing to present the testimony of an expert like Dr. Cross to effectively explain to the jury the difficulties Movant experienced growing up as an African-American male in rural Missouri.

Dr. Cross has no specific training in forensic psychology nor is he certified as a forensic psychologist. Dr. Cross reported one sister, Lisa, refused to testify or cooperate on behalf of Movant because he was mean to her growing up. Dr. Cross offered very little new information or insights into Movant's life and his testimony was not significantly different than that presented at Movant's trial by his trial expert.

Both Ms. Turlington and Mr. Kenyon believed Dr. Draper was a good witness and

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they liked to use her at trials. Dr. Cross is not particularly persuasive or effective as a witness. He even testified that his testing data was pretty consistent with Dr. Schultz's testing data. Dr. Cross revealed that both his validity scales and those of Dr. Schultz showed deception and invalidity. While Dr. Cross dismisses this as due to drug use, this explanation sounded wholly implausible and Dr. Cross sounded as if he were merely making excuses for this evidence of deception.

Dr. Cross testified that Movant did not adjust well in the Navy, in part, because he had come to expect "privileges" and was not inclined to follow orders. Yet, he then offers the inconsistent testimony that Movant is used to being under the "control" of people throughout his life, including his mother and his coaches. Dr. Cross did not seem to be aware of this inconsistency, but it is readily apparent.

Movant told Dr. Cross he became upset when he saw child pornography on Mr. Lape's computer. The evidence established that was not possible and untrue. Detective James testified that the child pornography on Mr. Lape's computer—which was never proven that Mr. Lape obtained—was never opened after being downloaded. Movant did not see this pornography; that fact is beyond dispute. The Court also finds that this claim is a deliberate and complete fabrication. Thus, the entire premise of Dr. Cross's theory is based on his acceptance of Movant's fabrication.

The only insight Dr. Cross offered concerning the differences between African-Americans and whites dealt with variations in test results. These were tests Dr. Cross chose

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to administer and the Court is left to wonder why Dr. Cross gave tests he believed to be invalid.

Dr. Cross was clearly inclined to believe Movant's version of events, and his report was incomplete. He became extremely defensive on cross-examination and lacked any effectiveness as a witness. His conclusion that Movant "could not think ahead" because of his diminished capacity is completely incredible and would not be believed by any juror.

Given the clear evidence that Movant did not see any child pornography and did not report seeing any pornography until he learned of its existence post-conviction, Dr. Cross's conclusions are simply not believable. A jury would only be outraged by Dr. Cross attempting to aid Movant in this fabrication, regardless of whether Dr. Cross was doing so intentionally or not.

31. Movant called Jim Mills as a witness. He testified at Movant's previous trial, and testified about Movant's behavior in the jail. Mr. Mills was a jailer at the time. He offered nothing new in his testimony and trial counsel was not ineffective for failing to bring out this alleged additional information.

32. Movant called Louise Tipler as a witness. She went to school in Portageville. She did not go to school with the Fitzgerald children. She offered absolutely no evidence that would have been relevant or helpful to the Movant and trial counsel was not ineffective in failing to call Mrs. Tipler as a witness. Her testimony would not be admissible because it was completely irrelevant and in no way mitigating.

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33. The information on Mr. Lape's computer, rather than being exculpatory or mitigating, is actually quite damaging to the Movant. The prosecution has a very powerful argument that it was not Mr. Lape, but actually Movant, himself, who was engaged in the inappropriate chats that Movant tries to assert were undertaken by Mr. Lape.

Movant told his legal team that he was using Mr. Lape's computer at least on July 1, 2002 (Exhibit 12, p. 4421). Mr. Lape left for his trip to the Lake on July 2, 2002 (Movant's Exhibit 97; Scott Cate depo, pp. 59-60). As Detective James explained, the account the chats occurred on had never been used until July 2, 2002—the day Mr. Lape left town. Those July 2, 2002, chats were deleted. This account was then used again on July 9 and July 12—after Mr. Lape was murdered. Thus, the State can argue very convincingly that it was Movant who used this account to engage in these chats after Mr. Lape left the home. This means that Movant was making vulgar references to Mr. Lape's daughter, on Mr. Lape's own computer, while planning Mr. Lape's murder. This is reinforced by the fact that the chats prior to Mr. Lape's murder were deleted, but once he was murdered there was no need to delete those later chats. No jury would find these facts mitigating. And the fact that Movant would attempt to blame his own lascivious conduct on his victim would very likely make the jury very angry at Movant and his attorneys.

This inference is reinforced by the fact that when Movant and Mr. Brown returned to Mr. Lape's home after murdering him, they ordered a significant number of pornographic movies on Mr. Lape's satellite dish. A search of Mr. Lape's home found no evidence

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whatsoever of any pornography. Thus, the State could argue very forcefully that the chats with, and about, underage girls were authored by Movant.

34. Additionally, Megan Lape testified very persuasively that her father never said or did anything inappropriate to her.

35. With regard to the downloaded child pornography, Movant presented no evidence that this was downloaded by Mr. Lape. Thus, aside from the unlikely admissibility of "reverse victim impact" evidence, Movant has not laid a sufficient foundation to argue Mr. Lape was the person who obtained or viewed this material.

36. The Court finds that Movant falsely claimed that he viewed this pornography on Mr. Lape's computer. Detective James testified that these files were downloaded and most were "corrupted," that is to say, unviewable. More important, his analysis of the computer shows that they were not viewed by anyone during the time Movant was at Mr. Lape's home. In fact, no one viewed them. There is no factual dispute over this matter. Thus, the opinions of both Ms. Alfonso and Dr. Cross are based on a complete fabrication by Movant.

Movant told his post-conviction counsel that "something" was on the computer (Exhibit 15, p. 3787), yet both attorneys testified Movant never told them anything about pornography.

37. Thus, Movant's claims in 8(b) are denied. The contents of the hard drive were not "critical to any mental health professional retained by counsel to evaluate [Movant] for

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mental illness" because Movant was not "aware of the pornographic material contained on the hard drive." Instead, Movant has alleged a patently false claim in an attempt to make irrelevant material relevant.

38. In Claim 8(c), Movant asserts that the prosecutor committed misconduct by misleading Movant's trial counsel into believing there would be a plea agreement if Movant provided information leading to the indictment of Patrick Davis. Movant has failed to present any evidence to support this serious allegation of "unprofessional, unethical, and deliberately misleading behavior" by the prosecutor. There is no evidence that Mr. Davis was ever indicted. Thus, Movant did not present any evidence that he met a condition for such a bargain. In addition, neither Turlington or Kenyon ever testified that the prosecutor misled them. They testified that they spent considerable effort trying to get evidence to implicate Mr. Davis, but could not develop any evidence to corroborate Movant's claim. Given the strength of the State's case and the evidence against Movant, it was entirely reasonable for Movant's counsel to believe their best hope for sparing Movant from the death sentence was to gather evidence to indict Mr. Davis. They simply could not do so. But there is no evidence that the prosecutor misled defense counsel or ever acted improperly.

39. In Claim 8(d), Movant claims counsel was ineffective in agreeing to have the case heard in New Madrid County. Movant never asked Ms. Turlington or Mr. Kenyon about their thoughts on this issue and, thus, failed to overcome the presumption that this was a matter of sound trial strategy. Movant presented no evidence that he did not get a fair trial

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before a qualified jury.

This claim is denied.

40. In Claim 8(e), Movant asserts counsel was ineffective in failing to strike juror Diretha Moore Thomas because she had allegedly been in an altercation with Movant's aunt, Luvenia Fitzgerald. Movant presented no evidence on this claim. He did not prove there was an altercation, that Ms. Thomas had any memory of this incident, that it would cause her to have any prejudice towards Movant, or that trial counsel did not have a trial strategy in making their jury strikes and selections. Movant did not ask trial counsel about their decision. For example, while there is no evidence as to the racial composition of the jury, if Ms. Thomas was African-American, counsel may have decided her race or gender was a more important factor than this concern.

Claim 8(e) is denied.

41. Movant called Greg Chatten as a witness. Mr. Chatten is a forensic computer analyst who reviewed the hard drive of Mr. Lape's computer. He has some college training, but most of his experience has been on the job. He was originally hired to work on behalf of co-defendant Justin Brown. He cannot prove who created the profile attributed to Mr. Lape, and he cannot actually testify which computer was used to create the profile. A different YAHOO! profile with the name "prisoner" has Mr. Lape's picture, but the profile used to engage in the instant message chats concerning Megan cannot be attributed to Mr. Lape.

Mr. Chatten testified in several instances as to when the images he obtained were

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"accessed," but then testified he could not determine when these images were viewed. Detective James testified that one can, in fact, make such a determination and the Court finds this to be true. Whether based on a bias or lack of knowledge, Mr. Chatten's testimony otherwise is not true and not credible. Mr. Chatten could not testify or otherwise establish that the images or chats were associated in any way with Mr. Lape, other than that they were in Mr. Lape's computer.

42. The State called Detective David James. His testimony was also introduced by the Movant through deposition. Detective James testified that the YAHOO! account was created in October of 2001, but was never used until July 2, 2002. Someone attempted to delete those chats on July 2, 2002. But, after Mr. Lape's death, someone used that profile to engage in additional instant messaging. Detective James did identify the picture in the "prisoner" profile as Mr. Lape, but that was not the account used for any of the chats.

Detective James also testified that the Encase software does detect when downloaded items are accessed. He testified conclusively that the pornography on the computer was never accessed during the time period Movant was in the Lape home. He testified that the investigation recovered several pictures of Movant's daughter at the Lape home.[1] Detective James also testified that following Mr. Lape's murder, Movant and Mr. Brown purchased $300 worth of pornographic movies off of Mr. Lape's satellite dish.

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[1] At the time, the Court did not understand the relevance of this evidence. The Court now recognizes that the State believes it would be inconsistent for Movant to have believed Mr. Lape was a pedophile, and yet have his young daughter in that home.

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43. Megan Lape testified on behalf of the State. She very forcefully testified that her father never acted inappropriate towards her at any time. Her testimony was significantly more credible and compelling than Movant's "evidence" to the contrary. She testified that she was 18 in July of 2002, and her father knew her age. Thus, whoever engaged in the July 2, 2002, chat incorrectly stated Ms. Lape's age (Exhibit 11, p. 3855). Though never introduced, when Ms. Lape went to her father's home looking for him, Movant came to the door in his underwear[2] and called her "Megan."

The Court allowed the record to remain open so that Movant could submit the deposition testimony of Movant's original attorneys. Those depositions were submitted.

Jeff Estes is in the trial division with the Public Defender's Office and was one of Movant's original trial attorneys. He was in the Capital Division for slightly more than three years. He withdrew from the case in May of 2003. During the time he had the case of *State v. Mayes*, which was another death penalty case that Mr. Estes spent most of his time on. Dee Berman was Movant's other attorney on the case. Movant told Mr. Estes that the plan was not to kill Mr. Lape, but to get money from him. Movant claimed Mr. Brown was the person who shot Mr. Lape. Mr. Estes said he has very little independent recollection of the case because it has been five years since he was on the case.

Mr. Estes believed there would be a plea agreement and worked towards that end.

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[2] Movant told Dr. Cross that he thought Mr. Lape was a "freak" and weird because (1) he allegedly saw pornography on Mr. Lape's computer and (2) Mr. Lape walked around the

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The agreement was in exchange for Movant providing information about an attorney, Pat Davis. Mr. Estes identified several file memos that memorialized conversations Mr. Estes had with witnesses and Movant. The memos (Estes deposition Exhibits 1-12), demonstrate that a plea of life was hoped for, but never promised by the State at any point. For example, Deposition Exhibit 11, written by Dee Berman, states that Movant "is hoping this may bring an offer of LWOP, if he cooperates."

Dee Berman's testimony was also presented through deposition. She was in the Capital Litigation Division of the Public Defender's Office for over five years. She handled between 15 and 18 capital cases. She was also Movant's original trial attorney. Movant called Ms. Berman often. Ms. Berman was the lead attorney and had more contact with the prosecutor, Morley Swingle. She tried hard to get the State to agree to not seek the death penalty. She thought a plea was likely. Ms. Berman did hire a psychologist to evaluate the Movant. Ms. Berman had three to four total cases at the time. Mr. Swingle never did make a plea offer to Movant.

CONCLUSIONS OF LAW

44. CLAIM 8(A) - ALLEGED FAILURE OF PROSECUTION TO DISCLOSE ALLEGEDLY EXCULPATORY MATERIAL BY NOT DISCLOSING EXISTENCE OF CHILD PORNOGRAPHY ON THE VICTIM'S HOME COMPUTER

In his first point, Movant claims the prosecution violated his constitutional rights by intentionally failing to disclose to the defense that the murder victim's computer contained

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house in his underwear.

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files containing illegal child pornography. Movant claims this information could have made a difference in the outcome of his trial. This court disagrees. The existence of the child pornography on the victim's computer was irrelevant to all issues in the trial. The failure to disclose this information, for whatever reason, could not have affected his trial.

45. CLAIM 8(B) - INEFFECTIVENESS OF DEFENSE COUNSEL FOR FAILING TO LEARN ABOUT EXISTENCE OF CHILD PORNOGRAPHY ON THE VICTIM'S HOME COMPUTER

Movant claims ineffective assistance of counsel on the part of his trial lawyers for failing to find out about the existence of child pornography on the home computer of the murder victim, Ralph L. Lape, Jr. The existence of the child pornography on the victim's computer was irrelevant to all issues in the trial. The failure to learn about the irrelevant material, for whatever reason, could not have affected Movant's trial.

46. CLAIM 8(C) - CLAIM THAT PROSECUTOR DELIBERATELY TRICKED DEFENSE COUNSEL INTO NOT PREPARING FOR TRIAL BY LEADING THEM TO BELIEVE HE WOULD WAIVE THE DEATH PENALTY

Movant's claim that the prosecutor deliberately misled the defense lawyers into not preparing for trial by making intentional misrepresentations to them that "a deal was a real possibility in this case" is completely refuted by the testimony of the witnesses at the hearing. Furthermore, the record is clear that the defense attorneys did prepare for the case and tried it in a professional manner.

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47. CLAIM 8(D) - INEFFECTIVENESS OF COUNSEL IN PERMITTING CHANGE OF VENUE TO NEW MADRID COUNTY

Movant claims his trial lawyers were ineffective for allowing his case to be tried in New Madrid County. He claims his first two lawyers, Jeffrey Estes and Delores Berman, were ineffective for carrying out Movant's express wishes of having the venue changed to the county where he had grown up. He also claims his subsequent attorneys, Sharon Turlington and David Kenyon, were ineffective for failing to "develop and present" evidence that Movant could not receive a fair trial in New Madrid County. The jury selection process in this case weeded out jurors who could not be fair to both sides in the trial. Movant has failed to show that he could not receive a fair trial in New Madrid County.

48. CLAIM 8(E) - INEFFECTIVENESS FOR FAILING TO STRIKE JUROR DIRETHA MOORE THOMAS FOR CAUSE

Movant has failed to show that his trial counsel rendered ineffective assistance of counsel for failing to move to strike juror Diretha Moore Thomas.

49. CLAIM 8(F) - INEFFECTIVENESS FOR FAILING TO HIRE A MITIGATION SPECIALIST AND FOR NOT THOROUGHLY INTERVIEWING PENALTY PHASE WITNESSES

Movant has failed to show that his trial counsel rendered ineffective assistance of counsel by failing to hire a "mitigation specialist" or by not being sufficiently thorough in their preparation of penalty phase witnesses.

50. CLAIM 8(G) - INEFFECTIVENESS IN FAILING TO INVESTIGATE SOCIAL HISTORY WITNESSES FOR PENALTY PHASE

Movant has failed to show that his trial counsel rendered ineffective assistance of

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counsel by failing to interview additional witnesses to testify about Movant's childhood. He has failed to meet his burden of proof that additional witnesses Gary Riley, Jim Mills, Mr. and Mrs. Arvil Skinner, Cheri Rone, Carol Underwood, Phil Newman, Louise Tipler, Larones Nelson, and John Terry would have provided testimony that would have made a difference in the outcome of his trial. Their testimony would have been cumulative. It is not ineffective assistance of counsel to fail to present cumulative evidence. *State v. Carter*, 955 S.W.2d 548, 555 (Mo. banc 1997).

51. CLAIM 8(H) - INEFFECTIVENESS FOR FAILING TO HIRE PSYCHOLOGIST DONALD CROSS

Movant presented the testimony of an expert, Dr. Wanda Draper, at trial. He now claims his attorneys were ineffective for failing to hire a different psychologist, one Donald Cross. Movant has failed to establish that Cross would have done a better job than Draper at his trial. Movant has failed to meet his burden of proof that not hiring Cross made a difference in the outcome of his trial.

52. CLAIM 8(I) - INEFFECTIVENESS FOR FAILING TO HIRE CASSIE ALFONSO, A CULTURAL MITIGATION SPECIALIST

Movant claims his trial lawyers were ineffective for failing to hire a "cultural mitigation specialist" named Cecilia Alfonso. Movant has failed to meet his burden of proof that the testimony of this witness would have made a difference in the outcome of his trial.

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53. CLAIM 8(J) - INEFFECTIVENESS FOR FAILING TO PRESENT TESTIMONY IN PENALTY PHASE ABOUT MOVANT'S COOPERATION WITH AUTHORITIES IN OTHER INVESTIGATIONS

Movant claims his trial lawyers were ineffective for failing to present evidence to the jury about his cooperation with authorities regarding other criminal investigations. What Movant fails to note is that his cooperation specifically involved other crimes and swindles he had participated in. The prosecution had agreed not to bring this other bad conduct to the attention of the jury and kept that promise. Counsel was certainly not ineffective for failing to open the door to this bad conduct evidence themselves. Movant failed to present any evidence that he "cooperated" with authorities and it is quite obvious that, to the extent he attempted to do so, Movant's only motivation was self-interest. This evidence would not have been helpful.

54. CLAIM 8(K) - UNCONSTITUTIONALITY OF RULE 29.15

Movant claims Rule 29.15 is unconstitutional in that it fails to provide reasonable access to the courts because of "unreasonably short time limitations." This issue has already been ruled upon by the Missouri Supreme Court, which held that the time limitations established by Rule 29.15 are constitutional, even in death penalty cases. *State v. Carter*, 955 S.W.2d 548, 562 (Mo. banc 1997).

55. CLAIM 8(L) - CONSTITUTIONALITY OF DEATH BY LETHAL INJECTION

Movant claims that death by lethal injection is unconstitutional. The Missouri Supreme Court has already rejected this claim. In order to state a viable claim, the Movant

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must allege facts that tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri. *Williams* v. *State*, 168 S.W.3d 433, 446 (Mo. banc 2005). Movant has failed to meet his burden of pleading and proof on this issue.

***PRO SE* MOTION**

This Court has also reviewed the Movant's original *pro se* motion filed in this matter and hereby finds that it raises no other issues not already addressed by these findings of fact and conclusions of law.

WHEREFORE, in that the Movant has failed to carry his burden of proof upon any of the claims made in his Motion, it is hereby ORDERED, ADJUDGED and DECREED, that the Motion to Vacate, Set Aside or Correct the Judgment or Sentence be and hereby is DENIED.

Oct 8, 2008
Date

J. Max Price
Sr. Circuit Court Judge

A TRUE COPY
OCT 15 2008
Marsha Meatte Holiman, Circuit Clerk
New Madrid County, Mo.
By: [signature]

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IN THE
MISSOURI SUPREME COURT

MARK GILL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 89831
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

MOTION TO ACCEPT AS PART OF THE RECORD ON APPEAL COPIES OF DOCUMENTS THE STATE AGREES IT SUBMITTED TO THE 29.15 HEARING JUDGE OR TO REMAND FOR A HEARING ON WHY THESE DOCUMENTS ARE NOT PART OF THE CIRCUIT COURT'S CASEFILE

COMES NOW, Mark Gill, the appellant, by and through counsel Assistant Public Defender William J. Swift, and moves this Court to accept for filing and treated as part of the record on appeal a copy of Assistant Attorney General Theodore Bruce's September 8, 2008 letter sent to Judge J. Max Price and the State's Proposed Findings Of Fact And Conclusions of Law that accompanied Mr. Bruce's letter. In the alternative, Mr. Gill requests that if this Court refuses to accept for filing as part of the record on appeal the referenced documents that this Court remand this case for a hearing on why the Circuit Court's file does not

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contain these documents and to allow Mr. Gill the opportunity create a substitute record this Court will accept. In support of this motion undersigned counsel relies on the following:

1. In respondent's brief, it has argued that the claim regarding the 29.15 judge having signed the State's Proposed Findings of Fact And Conclusions of Law should not be reviewed because the appellant did not file with this Court, as part of the record on appeal, the State's Proposed Findings of Fact And Conclusions of Law. *See* Appellant's Brief Point IV at 87-97 and Respondent's Brief at 48.

2. This case is an appeal of Mr. Gill's 29.15 death penalty case which was heard in the Circuit Court of New Madrid County in New Madrid County Case No. 05NM-CV00799 and before a special judge appointed by this Court, Judge J. Max Price. In the Circuit Court of New Madrid County, the state was represented by Assistant Attorney General Theodore Bruce.

3. Attached to this motion is a stipulation signed by undersigned counsel on behalf of Mr. Gill and by Assistant Attorney General Farnsworth on behalf of the state. The stipulation has attached to it a copy of a letter dated September 8, 2008 from Assistant Attorney General Bruce to Judge J. Max Price. The letter indicates that accompanying it was the State's Proposed Findings Of Fact And Conclusions of Law in Mr. Gill's 29.15 case, which is the subject of this appeal. Also, attached to the stipulation is a copy of the State's Proposed Findings

of Fact and Conclusions of Law, as they were submitted to Judge J. Max Price in Mr. Gill's 29.15 case.

4. In the Circuit Court of New Madrid County, Mr. Gill was represented by Assistant Public Defenders Loyce Hamilton and Robert Lundt. The copy of Mr. Bruce's cover letter to Judge Price and Mr. Bruce's Proposed Findings that are attached to the stipulation were made from the copies that Mr. Bruce served on Ms. Hamilton and Mr. Lundt. Mr. Bruce's cover letter and his Proposed Findings are contained in Mr. Gill's file now in undersigned counsel's custody.

5. New Madrid County is in the 34th Judicial Circuit and the mailing address for the Circuit Clerk of New Madrid County is 450 Main St. New Madrid, Mo. 63869. *See* State Judicial Directory.

6. Mr. Bruce's letter was addressed to Judge J. Max Price at P.O. Box 551 Salem, Mo. 65560. The address P.O. Box 551 Salem, Mo. 65560 is an address that is used by the Judges of 42nd Judicial Circuit comprising Crawford, Dent, Iron, Reynolds and Wayne Counties. That P.O. Box in Salem, Mo. is not an address used by the Circuit Court of New Madrid County. *See* State Judicial Directory.

7. Attached hereto is an affidavit from New Madrid County Deputy Clerk Vicki Simpson which sets forth that the New Madrid County case No. 05NM-CV00799 case file in *Mark Gill v. State of Missouri*, does not contain

Proposed Findings of Fact And Conclusions of Law from the State of Missouri and does not contain any associated cover letter from Mr. Bruce for the submission of its Proposed Findings. For that reason, Mr. Gill obtaining certified copies of those documents from the Circuit Clerk was and continues to remain impossible.

8. The New Madrid County casefile docket entries reflect that Mr. Gill's counsel filed Proposed Findings of Fact and Conclusions of Law (29.15L.F. 4). In contrast, there is no docket entry for the state having filed Proposed Findings of Fact and Conclusions of Law (29.15L.F. 1-4).

9. While Mr. Farnsworth has stipulated that the copies of Mr. Bruce's cover letter and Mr. Bruce's Proposed Findings copies are true and accurate copies of those documents, Mr. Farnsworth has refused to stipulate that those documents can now be filed with this Court. Mr. Farnsworth has declined to stipulate to their filing, even though the Circuit Clerk of New Madrid County cannot provide certified copies of these documents, since they are not in Mr. Gill's New Madrid County casefile.

10. Undersigned counsel has gone through side by side the Findings of Fact And Conclusions of Law that Judge J. Max Price signed (29.15L.F.510-43) and the copy the state has now agreed is a true and correct copy of Mr. Bruce's Proposed Findings. That comparison shows that Judge Price did not change anything and signed verbatim the state's findings as submitted by Mr. Bruce. That

comparison shows that Mr. Bruce did not submit to Judge Price a document called "Proposed Findings," but instead submitted a document called "Findings" with lines left blank for Judge Price to insert the date along with his signature, which is what Judge Price did.

11. Undersigned counsel has acted in good faith to seek the state's agreement to the filing of what it acknowledges are copies of Mr. Bruce's cover letter to Judge Price and Mr. Bruce's Proposed Findings, but the state has refused to stipulate that these documents can be filed with this Court. In seeking to obtain the State's stipulation that a copy of its Proposed Findings and Mr. Bruce's cover letter to Judge Price could be filed with this Court, undersigned counsel supplied Mr. Farnsworth a copy of Deputy Clerk Simpson's affidavit setting forth that the New Madrid County court's casefile does not contain the State's Proposed Findings and Mr. Bruce's letter to Judge Price that accompanied them. Thus, Mr. Farnsworth knows that that the Circuit Clerk for New Madrid County cannot provide certified copies of the documents at issue. Undersigned counsel has acted in good faith so that this Court can give this case full, fair, and complete review in an orderly and expeditious time frame.

12. In Mr. Gill's trial, his brother Carl Gill's testimony was presented via video deposition (trial Exhibit L) and that videotape was referenced at page 120 of Mr. Gill's brief here. Undersigned counsel did not have custody of either

the original transcript or a copy of the transcript of the Carl Gill videotape deposition to reference in my original brief.

Mr. Farnsworth obtained a copy of the Carl Gill transcript and requested, before he filed respondent's brief, that undersigned counsel stipulate that transcript was a true and correct copy and that I stipulate that transcript be filed with this Court. Undersigned counsel signed a stipulation that agreed that the Carl Gill transcript was a true and correct copy of his testimony and I also agreed that Mr. Farnsworth could file that document with this Court. Mr. Farnsworth filed the Carl Gill stipulation and transcript with this Court and has relied on it in his respondent's brief. *See, e.g.*, Resp. Br. at 80, 103 relying on "T.Ex.M." Undersigned counsel agreed that the copy of the Carl Gill transcript could be filed with this Court because doing so would facilitate this Court giving this case full, fair, and complete review in an orderly and expeditious time frame.

13. In *Dobbs v. Zant*, 113 S.Ct. 835, 836 (1993), the Court held that an individual sentenced to death is entitled to review of his sentence on appeal on a complete record. In *Zant*, the Court of Appeals had refused to consider a missing transcript when that transcript was discovered. *Zant*, 113 S.Ct. at 835. The Supreme Court held that it was error for the Court of Appeals to refuse to then consider that transcript. *Zant*, 113 S.Ct. at 836. Attached to this motion are copies that the state acknowledges were its Proposed Findings of Fact and Conclusions of Law and cover letter, yet the state will not agree to their filing. Under *Zant*, Mr.

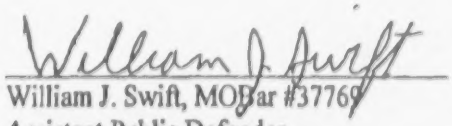
Gill is entitled to a complete record on appeal and to filing of the State's Proposed Findings of Fact and Conclusions of Law and its related cover letter. This Court should accept for filing those documents as part of the record on appeal. *See Zant*. To deny this motion's request to file as part of the record on appeal the requested documents would deprive Mr. Gill of his rights to be free from cruel and unusual punishment and to due process guaranteed under the Eighth and Fourteenth Amendments to the United State Constitution. *See, e.g., Zant*.

14. The state has agreed that what is attached to the stipulation is a true and correct copy of the state's Proposed Findings of Fact And Conclusions of Law and Mr. Bruce's cover letter to Judge Price. The Circuit Court cannot provide certified copies of these documents because the court file does not contain them. This Court should allow the documents the state acknowledges are true and correct copies of what it submitted to Judge Price to now be filed with this Court as part of the record on appeal.

15. If this Court refuses to accept the attached copy of the State's Proposed Findings of Fact and Conclusions of Law and cover letter as part of the record on appeal, then this Court should remand for a hearing on why the Circuit Court of New Madrid County's casefile does not contain the State's Proposed Findings of Fact and Conclusions of Law and their related cover letter and to allow Mr. Gill the opportunity to create a substitute record this Court will accept.

WHEREFORE, the appellant Mark Gill, prays that this Court accept for filing and treat as part of the record on appeal a copy of Assistant Attorney General Theodore Bruce's September 8, 2008 letter sent to Judge J. Max Price and the State's Proposed Findings Of Fact And Conclusions of Law that accompanied Mr. Bruce's letter. In the alternative, Mr. Gill requests that if this Court refuses to accept for filing as part of the record on appeal the referenced documents that this Court remand this case for a hearing on why the Circuit Court's file does not contain these documents and to allow Mr. Gill the opportunity to create a substitute record that this Court will accept.

Respectfully submitted,



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Certificate of Service

I hereby certify that on this 12th day of August, 2009, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

William J. Swift

William J. Swift

IN THE
MISSOURI SUPREME COURT

MARK GILL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 89831
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

STIPULATION – STATE'S COVER LETTER AND STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties stipulate that attached hereto is a true and correct copy of Assistant Attorney General Theodore Bruce's letter to Judge J. Max Price dated September 8, 2008 which letter indicates that accompanying it was the State's Proposed Findings Of Fact And Conclusions of Law in New Madrid County 29.15 case *Gill v. State*, No. 05NM-CV00799.

The parties further stipulate that attached hereto is a true and correct copy of the State's Proposed Findings of Fact and Conclusions of Law as they were submitted to Judge J. Max Price in New Madrid County in the 29.15 case *Gill v. State*, No. 05NM-CV00799 by Assistant Attorney General Theodore Bruce with his cover letter of September 8, 2008.

Respectfully submitted,

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ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

September 8, 2008

Judge J. Max Price
P.O. Box 551
Salem, MO 65560

Re: *Mark Anthony Gill v. State* PCR

Dear Judge:

Enclosed are the State's proposed Findings of Fact and Conclusions of Law. The final depositions have been taken, and I anticipate Mr. Gill's attorneys will be filing theirs soon.

I am also enclosing a diskette containing my proposed Findings. Please let me know if there is more I need to do to conclude this matter.

Sincerely yours,

JEREMIAH W. (JAY) NIXON
Attorney General

THEODORE A. BRUCE
Assistant Attorney General

TAB:jar

Enclosures

cc: Loyce Hamilton ✓
Marsha Meatte Holiman, New Madrid County Circuit Clerk

A-89

IN THE CIRCUIT COURT OF NEW MADRID COUNTY
STATE OF MISSOURI

MARK ANTHONY GILL,	)	
	)	
Movant,	)	
	)	Case No. 05NM-CV00799
v.	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this _____ day of _____, 20 _____, the Court, after evidentiary hearing, hereby denies Movant's Motion to Vacate, Set Aside or Correct Judgment, specifically making the following findings of fact and conclusions of law:

1. A New Madrid County jury found Movant guilty of first degree murder (Count I), kidnapping (Count II), armed criminal action (Count III), robbery in the first degree (Count IV), and tampering with a motor vehicle (Count V) in March of 2004 in Case No. 02-CR-754906. The jury recommended the death penalty for the first degree murder.

2. On April 19, 2004, Circuit Judge Fred Copeland sentenced Movant to death for the murder charge. He also sentenced him to 15 years for kidnapping, 30 years for armed criminal action, life in prison for first degree robbery, and 7 years for tampering with a motor vehicle, with all sentences to run consecutively.

3. Movant's convictions were subsequently affirmed on appeal in a unanimous decision by the Missouri Supreme Court. *State v. Gill*, 167 S.W. 3d 184 (Mo. banc 2005).

4. In this proceeding, Movant attacks his convictions by motion under Rule 29.15,

claiming that his attorneys, Sharon Turlington, David Kenyon, Jeffrey Estes and Delores Berman, rendered him ineffective assistance of counsel at his trial. He also claims the prosecution violated his constitutional rights by failing to disclose exculpatory evidence.

5. The burden of proof is on the Movant, who has the burden of proving his claims for relief by a preponderance of the evidence. Rule 29.15(i).

6. To be entitled to relief based upon ineffective assistance of counsel, Movant must plead and prove two related but independent issues. First, he "must show that counsel's representation fell below an objective standard of reasonableness." *Byrd v. State*, 723 S.W.2d 37 (Mo. App. 1986), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674, 693 (1984); *Seales v. State*, 580 S.W.2d 733 (Mo. banc 1979). "Second, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different, *i.e.*, the defendant has been prejudiced by counsel's deficient performance." *Byrd*, 723 S.W.2d at 38; *Strickland*, 466 U.S. at 693; *Seales*, 580 S.W.2d at 736; *Aaron v. State*, 81 S.W.3d 682 (Mo. App. W.D. 2002); *Bucklew v. State*, 38 S.W.3d 395 (Mo. banc 2001); *Lyons v. State*, 39 S.W.3d 32 (Mo. banc 2001).

7. The proper standard for attorney performance is that of reasonably effective assistance. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under the prevailing professional norms. *Strickland v.*

Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

8. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 80 L.Ed.2d at 694.

9. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 80 L.Ed.2d at 694.

10. "Because of the difficulties in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy." *Strickland*, 80 L.Ed.2d at 695. There is a presumption that the decisions made by trial counsel were matters of trial strategy and Movant must present evidence to rebut and overcome that presumption. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996).

11. The hearing on this case was held in Cape Girardeau County by agreement of the parties, and for the convenience of the witnesses.

12. Movant requested a writ so that he could appear, which the Court initially

signed. Upon the request of the State, the Court reconsidered the writ and because of security concerns, the Court rescinded the writ over Movant's objection. The State indicated that it would cooperate in scheduling Movant's deposition if he wished to testify, but it appears Movant has not offered any testimony on his own behalf.

13. The case was called on June 16, 2008. Movant appeared by counsel, Loyce Hamilton and Robert Lundt. The State appeared by Assistant Attorney General Theodore A. Bruce. At the request of Movant, the Court took judicial notice of the entire file of the underlying criminal case, including transcripts.

14. Movant's primary claim is that had his counsel accessed, and used, evidence that there was child pornography and incestuous "chats" on the victim, Ralph Lape's, computer, the outcome of the trial would have been different.

Movant claims this "evidence" was relevant and admissible for a number of reasons. As the Court will set forth in more detail below, the Court finds that this information was not exculpatory, the prosecutor did not fail to disclose exculpatory information, and most important, that Movant's theory as to why it was relevant is a complete fabrication created by Movant to somehow make this information relevant.

Movant's co-defendant, Justin Brown, had access to this "evidence" before trial, but was not allowed to use it based on a Motion in Limine. Mr. Brown's conviction has been affirmed on appeal. *State v. Brown*, 246 S.W.3d 519 (Mo.App., S.D. 2008). As will be set forth below, this Court believes such evidence is generally not admissible. In addition,

Movant failed to establish that Mr. Lape was the individual who wrote the messages or downloaded the pornography.

Nevertheless, Movant makes the creative argument that he could have used this information about Mr. Lape as "leverage" to limit the victim impact evidence presented by Mr. Lape's family. In fact, he argues that is what happened in Mr. Brown's case and that is why Brown did not receive a sentence of death.

Movant suggests that the testimony of the victim's family "changed" between the Movant's trial and Justin Brown's trial. Movant further suggests that this is due to the fact that Justin Brown's attorneys had this evidence of information on Mr. Lape's computer which restricted the scope of the victim impact evidence. Movant then wishes this Court to infer that is the reason Mr. Brown's jury did not recommend a sentence of death.

a. There are differences in the testimony between the two trials. For example, in the Movant's trial, the victim's sister, Diane Mitchell, testified about her father in more detail. One of the factors was that Movant and Brown used Ms. Mitchell's and Mr. Lape's father's war records to ignite their bloody clothes to hide the evidence.

b. One difference is that in the Movant's trial, Ms. Mitchell was allowed to read a prepared statement. In *Brown*, the judge exercised his discretion in not allowing the witnesses to read statements. The Court believes this explains much of the difference between the two trials in terms of the testimony presented.

c. In addition, the Court does not believe the testimony offered in Movant's case, even if offered again, would have "opened the door" to evidence of the victim's "bad character."

d. The prosecutor did not help the witnesses prepare their witness statements or the content of the statements. Therefore, the prosecutor did not "tailor" the statements. The issues were different, to some extent, in the two cases. For example, in the Movant's trial, the defense made reference to the allegation that Mr. Lape had used a racial slur in referring to Movant. In response, the State presented evidence that Mr. Lape had been kind to a mixed-race child. The defense in *Brown* did not use the evidence of the racial slur, so the State did not present the evidence of Mr. Lape's interaction with the child. This is to be expected since Mr. Brown's attorneys could not reasonably expect the racial slur to have much impact in his case.

In addition, the Court does not believe that Movant's trial attorneys were ineffective in failing to anticipate or investigate the content of Mr. Lape's computer with the idea that there might be evidence in the computer to damage the victim's reputation. First, the Court does not believe that it is reasonable to presume or assume that someone will have pornography on his computer—or any other "evidence" to impeach the victim's character. The constitutional requirement is that counsel exercise the degree of skill that a competent attorney would exercise. This review, undertaken in this case, is not intended to be an opportunity to second-guess the judgments of the attorneys, but to decide if their representation was competent.

The Court does not believe this type of evidence is the type that courts require an attorney to anticipate, for two reasons. First, such evidence is unlikely and not to be expected. Second, this information—even if discovered—is of such tenuous value that it is not reasonable to require an attorney to make such a search.

15. "Reverse victim impact" evidence has by no means been established by the courts to be relevant or admissible. The United States Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), allowing victim impact evidence does not necessarily allow a defendant in the penalty phase of trial to impugn the victim's reputation. In fact, the purpose of the victim impact evidence is not to focus on the victim's character; it is intended to show the impact the victim's death had on the survivors.

Since the penalty phase of the trial cannot, in Missouri, digress into a comparison of the value of the victim's life and the defendant's life, *State v. Johnson*, 22 S.W.3d 183, 190 (Mo. banc 2000), the relevance "that the victim's personal life was less than ideal," *State v. Powers*, 101 S.W.3d 383, 403 (Tenn. 2003), is dubious.

It may be that a court might find such evidence in a particular case admissible. This Court does not foresee such a circumstance. But counsel for either the prosecution or the defense could not reasonably expect or anticipate that this "evidence" would be of any significance in the guilt or penalty phase.

Both Ms. Turlington and Mr. Kenyon testified that they could not ethically argue that Mr. Lape's life had less value even if they had evidence that he might have been a pedophile.

This is not proper argument, and it is not proper argument because that should not be a basis for the jury's decision. Yet, in essence, Movant wants to present this evidence with the hope that the jury will, in fact, improperly consider it in the very way that it should not be considered. This is not a legitimate hope and this Court does not believe "reverse victim impact" evidence has any place in the criminal process.

16. Sean Goliday testified by deposition and his testimony was admitted without objection by the State. Mr. Goliday was an investigator for the Public Defender's Office in the Capital Litigation Division. He was assigned to assist in the defense of the Movant. He had received training in mitigation investigation. He worked on approximately 30 capital cases in his four and one-half years in the Public Defender's Office. He was a well-qualified investigator with an extensive background in sociology, including a master's degree in sociology in 2001.

Ms. Bowman and Mr. Estes were the attorneys originally assigned to the case. The attorneys were hoping to get a plea deal from the prosecutor in exchange for information Movant had on attorney Pat Davis. After they left the office, Sharon Turlington and David Kenyon were assigned to the case. Mr. Goliday's duties in Movant's case were typical—collecting records and contacting potential witnesses.

Mr. Goliday gathered a great deal of information—information that was used by trial counsel in preparation for trial. He was knowledgeable about his purpose and role. His role was not to interview witnesses, but to arrange interviews. Thus, the fact he did not interview

certain witnesses whom Movant claims should have been interviewed is not surprising.

17. Movant called his cousin, Derrick Fitzgerald, as a witness. He grew up in Portageville, as did Movant. Mr. Fitzgerald describes a family that could easily be described as dysfunctional. While he shared certain details that were not contained in other reports or testimony, the testimony was not significantly different from the general picture the Movant's trial counsel presented to the jury.

His testimony concerning the alleged sexual abuse of Movant by Dwayne Frazier is inconsistent and lacking in credibility. He testified that he spoke to Movant about the abuse at the age of 14; yet, he told Cecilia Alfonso that this occurred at age 12 (Movant's Exhibit 83, p. 5). Frankly, the testimony, when presented by this witness, was not very compelling or persuasive, in spite of the shocking nature of the allegations. He laughed very inappropriately when discussing some of the alleged details. He seemed to find some of the Movant's conduct amusing and the Court believes this witness would not have been helpful at all.

Other testimony by this witness would definitely not have been helpful to Movant. The description by Mr. Fitzgerald that Movant got "meaner" as a teenager and as he got older is not the type of testimony that would be helpful. He also testified that he has not had contact with Movant since Movant went into the Navy.

Trial counsel was not ineffective in failing to call this witness at trial.

18. Movant called Cecilia Alfonso, a licensed clinical social worker from New

York, who asserts that she is a mitigation expert. While it is evident that she earnestly believes that the information she reports is important, the testimony was less than compelling. She also got some details she thought were "significant" completely wrong. She stressed the age of Mr. Gill's father as significant, but testified he was 58 years old rather than 73.

Ms. Alfonso's explanations as to the relevance of Movant's social history tended to be rambling and very difficult to comprehend or understand. Ms. Alfonso clearly thought what she said is important, but it was not very clear to this Court why she thought it was important. Ms. Alfonso repeatedly said "this is important" before relating an event—or alleged event—that did not offer any compelling information that any reasonable jury would see as mitigating or otherwise relevant.

The law does not require a defense attorney to hire a "mitigation expert." This witness is not a mitigation expert, and her testimony was nothing more than relating hearsay statements from Movant's family in an ineffective manner.

She testified that Movant had male coaches and teachers who tried to help him and encourage him. She called the military an "alien culture." She testified that Movant told her all he did from 18 to 24 was get drunk and have sex. For a trained social worker, Ms. Alfonso seemed to enjoy using colorful and vulgar language freely without consideration as to the impact her glee at word choices might have on the listener.

Ms. Alfonso opined that Mr. Gill was motivated to kill Mr. Lape because he was

"suspicious" that Mr. Lape was a pedophile (Exhibit 84, p. 11). This conclusion has very little factual basis and a court would not let the witness offer such a conclusion based on the scant information Mr. Gill allegedly told Ms. Alfonso that Mr. Lape walked around his home in his underwear and that he watched "porno" movies. Ms. Alfonso watched a video involving children and animals that Movant's counsel gave her, but there is no evidence connecting Mr. Lape to this video. In fact, these statements by Mr. Gill to Ms. Alfonso are inconsistent with statements Movant allegedly made to others in preparation for his Motion to Vacate, making Mr. Gill's new theory that he killed Mr. Lape because he was a pedophile even more incredible and unbelievable than it already is.

Again, the Court does not believe that any information this witness proffered would be persuasive, and not significantly different than that provided by other defense witnesses.

19. David Kenyon, Mr. Gill's trial attorney testified. Mr. Kenyon has been trained on investigating and preparing for capital cases and has been involved in approximately 25 capital cases. He and Sharon Turlington entered their appearance on behalf of Movant in June of 2003.

David James was not endorsed by the State as a witness until shortly before the trial and the defense did not feel the need to interview Detective James. Detective James was endorsed on the Second Amended Information, filed February 16, 2004. James did not testify at trial.

There was nothing in the police records, reports, or disclosures that would lead Mr.

Kenyon, or any other reasonable attorney, to believe it was necessary to depose or interview Detective James. Mr. Kenyon testified that Prosecutor Morley Swingle is well-prepared and that he did not assume Mr. Swingle would fail to endorse a witness he intended to use.

Mr. Kenyon could not articulate how he would have possibly used this evidence that supposedly was on the computer. Mr. Kenyon stated the phrase used by capital defense attorneys is "you do not kick the corpse." There is significant wisdom in that philosophy and the Court does not believe that Mr. Kenyon would have attempted to use this material, and that no reasonable counsel would ever do so.

The claim that the State had some affirmative obligation to automatically produce the entire content of the computer, simply because it was seized, is not true. In fact, Mr. Kenyon testified that he explicitly asked Prosecutor Swingle if there was evidence in the computer that incriminated his client. Thus, he obviously knew he did not have the actual content of the computer, and the Court does not believe a prosecutor is obligated in all occasions to provide the entire content of every computer seized. And that was not the belief of Mr. Kenyon.

The Court finds that even had Mr. Kenyon known about the content of the computer, Mr. Kenyon would not have used this information in an attempt to "kick the corpse." When asked how he would use this information, Mr. Kenyon paused significantly and seemed to be searching for a justification for its use.

20. The Court finds that no competent counsel would have attempted to use the

scant "evidence" of Mr. Lape's laptop containing certain "chats" and pornography at trial.

First, any competent attorney would know that there was insufficient evidence to establish that Mr. Lape was the author or receiver of this information. In fact, the Court finds that based on the evidence presented by Movant, a trial court would not have permitted this evidence at trial because there is insufficient evidence to establish Mr. Lape was involved in the communications or downloaded the material.

In fact, to have made the allegation would have opened the door to the prosecution presenting evidence that it was Movant who was involved in the "chats" involving discussions of sex. There is no evidence that any such chats occurred prior to Mr. Gill's arrival in Mr. Lape's home. On July 2, 2002, the date of these communications, the evidence was Mr. Lape was out of the home, and on his way to the Lake (Movant's Exhibit 97; Scott Cate depo, pp. 59-60). Movant had access to Mr. Lape's passwords. Movant used Mr. Lape's credit card to purchase several hundred dollars worth of pornographic videos from his satellite dish. There is strong circumstantial evidence that it was Movant, not Mr. Lape, who had these chats about Megan. The evidence is significantly stronger that it was Movant, rather than Mr. Lape.

A jury would not only likely be outraged against Movant and his counsel for making the accusation, but the outrage would likely be made greater by the evidence to suggest Movant himself was actually the source of much of this material.

The Court also finds that the allegation that Movant was somehow "upset" by his

belief that Mr. Lape was a pedophile is completely incredible and is a transparent creation of Movant after his conviction. Any attempt to make such a claim to a jury would be seen as an obvious fabrication.

During Movant's confessions, he not once stated that his motivation to kill Mr. Lape was anything other than money. In fact, that was Movant's only motivation. He stated in his confession to Sergeant Gregory, on August 2, 2002, that "I sold my soul for $5,000" (Page 25). And rather than suggest Mr. Lape "deserved" to be killed, Movant stated that no one was supposed to get hurt (Page 30). The only information Movant ever provided to his original attorneys, Jeff Estes and Dee Berman, about the killing was that it was supposed to be a robbery and that Justin Brown was the one who shot Mr. Lape. The evidence is overwhelming that the claim that Movant was motivated by a belief Mr. Lape was a pedophile is a complete fabrication and without merit.

Movant's claim that he observed Mr. Lape viewing pornography is not only refuted by the detailed confessions of Movant, but Movant presented no evidence to support this claim. Movant never said to his trial attorneys, during numerous discussions, that he had any belief that Mr. Lape was a pedophile or that he had seen Mr. Lape view any pornography.

Again, the Court finds that this claim is a complete fabrication and, more important, any jury hearing such a claim would also conclude that such a claim is a complete fabrication and would be angered by the attempt. The evidence is that the material was downloaded once and never looked at again (Swingle depo, p. 30).

21. Movant presented the testimony of his mother, Alice Gill. Ms. Gill testified at Movant's penalty phase previously. Movant's claim that there was additional information his trial counsel should have elicited from his mother. The Court notes from the outset that it would be obvious to any juror that Ms. Gill was coached. Her testimony is not significantly different from her previous testimony, but she has clearly been instructed how to answer questions to reveal her "insights" into her past.

Ms. Gill's description of the discrimination that existed in her life is undoubtedly true. But Ms. Gill is very unsympathetic as a witness and her testimony offers nothing that a juror would consider as mitigating or in any way relevant to the murder of Mr. Lape by her son.

The photographs and family history would not have had any positive effect upon the jury and the Court does not believe any competent attorney would ever attempt to present such irrelevant material to the jury.

22. In Claim 8(a), Movant makes the allegation that the State failed to disclose evidence in Mr. Lape's computer that was mitigating. While the motivation of the prosecutor is not relevant to whether a *Brady* violation occurred, the Court does find that the prosecutor did not attempt to withhold any information from the defense.

The State did disclose the contents of the computer, sending the Encase report on February 4, 2004 (Exhibit 15, pp. 5125-5130). The prosecutor stated that he did not believe there was anything of relevance on the computer (Swingle depo, p. 90).

The first that the prosecutor knew there might be child pornography on the computer

is when—following Movant's trial—co-defendant Justin Brown's attorney asked for an actual copy of the contents (Swingle depo, p. 36). It was then that Detective James told Mr. Swingle that there was some child pornography (Swingle depo, p. 36).

In the Justin Brown case, the evidence was fully revealed prior to trial but was excluded and ruled irrelevant (Swingle depo, p. 46).

As the Court has stated in more detail, above, the evidence was not exculpatory and had the defendant had this information it would not have changed the outcome of the trial.

In general, the character of the victim is never relevant, except in cases of self-defense. *State v. Isa*, 850 S.W.2d 876, 895 (Mo. banc 1993). In a death penalty case, a trial court has the discretion to admit evidence it deems helpful to the jury in determining punishment. *State v. Kinder*, 942 S.W.2d 313, 331 (Mo. banc 1996). The Missouri Supreme Court has already upheld the victim impact evidence in this case. *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005).

23. What Movant proposes offering is what is called "reverse impact evidence;" defense counsel David Kenyon referred to it as "kicking the corpse." While this Court cannot predict with certainty how our Supreme Court will rule on the admissibility of such evidence, this Court believes such evidence is not relevant and is not mandated by the Constitution.

The majority of courts addressing this issue have held such evidence inadmissible. *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003); *People v. Harris*, 118 P 3d 545 (Cal. 2005);

State v. Southerland, 447 S.E.2d 862 (1994); *Alvarado v. State*, 912 S.W.2d 199 (Tex.Crim.App. 1995); *Hill v. State*, 427 S.E.2d 770 (Ga. 1993).

The presentation of evidence by Mr. Lape's family as to how his death affected them does not then allow a defendant "to disparage the character of the victims in rebuttal." *People v. Harris*, 118 P.3d at 550. "Comparative character analysis" is not proper. *State v. Southerland*, 447 S.E.2d at 867.

Movant tries to suggest that even if he could not have used this evidence, the "threat" of using it would have tempered the testimony of the victim's family during the penalty phase. The Court has reviewed the testimony and sees nothing that would open the door to this evidence.

Again, defense counsel knew of the computer and had discussed the computer and the Encase report, according to Ms. Turlington, prior to the prosecutor sending the Encase report to counsel. Ms. Turlington testified that Mr. Swingle told them there was nothing relevant on the computer. The Court believes that was the prosecutor's honest and accurate assessment.

Second, the Court is convinced, after hearing the evidence and the witnesses, that any jury would be angered by any attempt to denigrate the victim in this case and it would be seen as a transparent attempt to disparage a murder victim. Even if a jury were to believe Mr. Lape was the source of this material—which the Court does not believe to be true and does not believe the Movant established—the jurors would still conclude that the defense was simply trying to focus the jury on the value of the victim's life rather than Movant's

culpability. Both Ms. Turlington and Mr. Kenyon paused a significant period of time when asked about actually using this material and their responses were half-hearted at best. While generally forthright and honest in their testimony, the Court does not believe either lawyer would have seriously considered introducing this speculative evidence in support of their client.

Counsel was not ineffective in failing to examine the computer.

24. Sharon Turlington testified. Her testimony was generally consistent with that of Mr. Kenyon. She testified that she, too, was aware of the computer Movant stole from Mr. Lape and had been informed by the prosecution that there was nothing of any evidentiary value on the computer. She testified she saw no reason to have the computer examined. She testified that Movant did admit to her that he had used Mr. Lape's computer and that he never stated to her that Movant ever saw any pornography on the computer, suspected Mr. Lape of being a pedophile, or otherwise engage in improper behavior. Her testimony reinforces the conclusion that the allegation that Movant was troubled by Mr. Lape's behavior is a mere post-trial fabrication.

25. Gary Riley testified on behalf of the Movant. He grew up in Portageville and coached Little League baseball teams, where he coached Movant for three years. While he was entirely credible, his testimony would not have altered the outcome of the case. In fact, Mr. Riley testified that Movant told him that he was in trouble because he was "chasing the dollar." This only confirms Movant's sole motivation for the killing was financial.

26. Movant called Sari Skinner as a witness. Ms. Skinner taught Movant in ninth grade English class. She described him as an average student, but said he was not a problem and a pleasure to have in class. She described him as a leader, social, and, frankly, inconsistent with the description of Movant given by Dr. Cross. Her testimony described a young man much different than what one would expect the victim of sexual abuse to display. Counsel was not ineffective in failing to call this witness at trial.

27. Arzil Skinner, Mrs. Skinner's husband, also testified on behalf of Movant. He was a coach and counselor in Portageville. He did not coach Movant, but was his counselor in school. He described Movant as "always happy," always smiling, enthusiastic, and related very well with teachers and other students. Again, this seems to contradict the conclusions of Dr. Cross. While a credible witness, he presented no evidence that would have altered the outcome in this case and trial counsel was not ineffective in failing to call this witness.

28. Movant called Cathy Luebbering as a witness. She is a "mitigation specialist" for the Missouri Public Defender's Office. She began working on Movant's case in 2005. Ms. Luebbering recited a long list of records she obtained. The Court notes that it is difficult to imagine why time, money, and energy would be spent on much of this material. Among the documents collected were records of relatives of Movant that did not offer any relevant information and, more important, records no one would have ever reasonably expected to produce relevant or helpful information. If it is Movant's claim that an attorney must hire a "mitigation specialist" to access every possible record in order to satisfy the attorney's

responsibility to his or her client, that claim is denied. Time spent on a case is not the equivalent to time well spent. Ms. Luebbering attempted to explain why this vast array of information is "relevant," but the Court did not find her persuasive at all. Trial counsel was not ineffective for failing to use a mitigation expert to engage in the type of "research" this witness produced.

29. Cheri Rone testified on behalf of the Movant. She was a school teacher for Portageville. She taught Movant and described him as a good student, a leader, well-liked, and happy. Again, this testimony is inconsistent with the suggestions that Movant was being victimized and suffering from post-traumatic stress syndrome. Trial counsel was not ineffective in failing to call this witness at trial.

30. Movant called Dr. Donald Cross, a clinical psychologist, as a witness. Movant asserts that trial counsel was ineffective for failing to present the testimony of an expert like Dr. Cross to effectively explain to the jury the difficulties Movant experienced growing up as an African-American male in rural Missouri.

Dr. Cross has no specific training in forensic psychology nor is he certified as a forensic psychologist. Dr. Cross reported one sister, Lisa, refused to testify or cooperate on behalf of Movant because he was mean to her growing up. Dr. Cross offered very little new information or insights into Movant's life and his testimony was not significantly different than that presented at Movant's trial by his trial expert.

Both Ms. Turlington and Mr. Kenyon believed Dr. Draper was a good witness and

they liked to use her at trials. Dr. Cross is not particularly persuasive or effective as a witness. He even testified that his testing data was pretty consistent with Dr. Schultz's testing data. Dr. Cross revealed that both his validity scales and those of Dr. Schultz showed deception and invalidity. While Dr. Cross dismisses this as due to drug use, this explanation sounded wholly implausible and Dr. Cross sounded as if he were merely making excuses for this evidence of deception.

Dr. Cross testified that Movant did not adjust well in the Navy, in part, because he had come to expect "privileges" and was not inclined to follow orders. Yet, he then offers the inconsistent testimony that Movant is used to being under the "control" of people throughout his life, including his mother and his coaches. Dr. Cross did not seem to be aware of this inconsistency, but it is readily apparent.

Movant told Dr. Cross he became upset when he saw child pornography on Mr. Lape's computer. The evidence established that was not possible and untrue. Detective James testified that the child pornography on Mr. Lape's computer—which was never proven that Mr. Lape obtained—was never opened after being downloaded. Movant did not see this pornography; that fact is beyond dispute. The Court also finds that this claim is a deliberate and complete fabrication. Thus, the entire premise of Dr. Cross's theory is based on his acceptance of Movant's fabrication.

The only insight Dr. Cross offered concerning the differences between African-Americans and whites dealt with variations in test results. These were tests Dr. Cross chose

to administer and the Court is left to wonder why Dr. Cross gave tests he believed to be invalid.

Dr. Cross was clearly inclined to believe Movant's version of events, and his report was incomplete. He became extremely defensive on cross-examination and lacked any effectiveness as a witness. His conclusion that Movant "could not think ahead" because of his diminished capacity is completely incredible and would not be believed by any juror.

Given the clear evidence that Movant did not see any child pornography and did not report seeing any pornography until he learned of its existence post-conviction, Dr. Cross's conclusions are simply not believable. A jury would only be outraged by Dr. Cross' attempting to aid Movant in this fabrication, regardless of whether Dr. Cross was doing so intentionally or not.

31. Movant called Jim Mills as a witness. He testified at Movant's previous trial, and testified about Movant's behavior in the jail. Mr. Mills was a jailer at the time. He offered nothing new in his testimony and trial counsel was not ineffective for failing to bring out this alleged additional information.

32. Movant called Louise Tipler as a witness. She went to school in Portageville. She did not go to school with the Fitzgerald children. She offered absolutely no evidence that would have been relevant or helpful to the Movant and trial counsel was not ineffective in failing to call Mrs. Tipler as a witness. Her testimony would not be admissible because it was completely irrelevant and in no way mitigating.

33. The information on Mr. Lape's computer, rather than being exculpatory or mitigating, is actually quite damaging to the Movant. The prosecution has a very powerful argument that it was not Mr. Lape, but actually Movant, himself, who was engaged in the inappropriate chats that Movant tries to assert were undertaken by Mr. Lape.

Movant told his legal team that he was using Mr. Lape's computer at least on July 1, 2002 (Exhibit 12, p. 4421). Mr. Lape left for his trip to the Lake on July 2, 2002 (Movant's Exhibit 97; Scott Cate depo, pp. 59-60). As Detective James explained, the account the chats occurred on had never been used until July 2, 2002—the day Mr. Lape left town. Those July 2, 2002, chats were deleted. This account was then used again on July 9 and July 12—after Mr. Lape was murdered. Thus, the State can argue very convincingly that it was Movant who used this account to engage in these chats after Mr. Lape left the home. This means that Movant was making vulgar references to Mr. Lape's daughter, on Mr. Lape's own computer, while planning Mr. Lape's murder. This is reinforced by the fact that the chats prior to Mr. Lape's murder were deleted, but once he was murdered there was no need to delete those later chats. No jury would find these facts mitigating. And the fact that Movant would attempt to blame his own lascivious conduct on his victim would very likely make the jury very angry at Movant and his attorneys.

This inference is reinforced by the fact that when Movant and Mr. Brown returned to Mr. Lape's home after murdering him, they ordered a significant number of pornographic movies on Mr. Lape's satellite dish. A search of Mr. Lape's home found no evidence

whatsoever of any pornography. Thus, the State could argue very forcefully that the chats with, and about, underage girls were authored by Movant.

34. Additionally, Megan Lape testified very persuasively that her father never said or did anything inappropriate to her.

35. With regard to the downloaded child pornography, Movant presented no evidence that this was downloaded by Mr. Lape. Thus, aside from the unlikely admissibility of "reverse victim impact" evidence, Movant has not laid a sufficient foundation to argue Mr. Lape was the person who obtained or viewed this material.

36. The Court finds that Movant falsely claimed that he viewed this pornography on Mr. Lape's computer. Detective James testified that these files were downloaded and most were "corrupted," that is to say, unviewable. More important, his analysis of the computer shows that they were not viewed by anyone during the time Movant was at Mr. Lape's home. In fact, no one viewed them. There is no factual dispute over this matter. Thus, the opinions of both Ms. Alfonso and Dr. Cross are based on a complete fabrication by Movant.

Movant told his post-conviction counsel that "something" was on the computer (Exhibit 15, p. 3787), yet both attorneys testified Movant never told them anything about pornography.

37. Thus, Movant's claims in 8(b) are denied. The contents of the hard drive were not "critical to any mental health professional retained by counsel to evaluate [Movant] for

mental illness" because Movant was not "aware of the pornographic material contained on the hard drive." Instead, Movant has alleged a patently false claim in an attempt to make irrelevant material relevant.

38. In Claim 8(c), Movant asserts that the prosecutor committed misconduct by misleading Movant's trial counsel into believing there would be a plea agreement if Movant provided information leading to the indictment of Patrick Davis. Movant has failed to present any evidence to support this serious allegation of "unprofessional, unethical, and deliberately misleading behavior" by the prosecutor. There is no evidence that Mr. Davis was ever indicted. Thus, Movant did not present any evidence that he met a condition for such a bargain. In addition, neither Turlington or Kenyon ever testified that the prosecutor misled them. They testified that they spent considerable effort trying to get evidence to implicate Mr. Davis, but could not develop any evidence to corroborate Movant's claim. Given the strength of the State's case and the evidence against Movant, it was entirely reasonable for Movant's counsel to believe their best hope for sparing Movant from the death sentence was to gather evidence to indict Mr. Davis. They simply could not do so. But there is no evidence that the prosecutor misled defense counsel or ever acted improperly.

39. In Claim 8(d), Movant claims counsel was ineffective in agreeing to have the case heard in New Madrid County. Movant never asked Ms. Turlington or Mr. Kenyon about their thoughts on this issue and, thus, failed to overcome the presumption that this was a matter of sound trial strategy. Movant presented no evidence that he did not get a fair trial

before a qualified jury.

This claim is denied.

40. In Claim 8(e), Movant asserts counsel was ineffective in failing to strike juror Diretha Moore Thomas because she had allegedly been in an altercation with Movant's aunt, Luvenia Fitzgerald. Movant presented no evidence on this claim, He did not prove there was an altercation, that Ms. Thomas had any memory of this incident, that it would cause her to have any prejudice towards Movant, or that trial counsel did not have a trial strategy in making their jury strikes and selections. Movant did not ask trial counsel about their decision. For example, while there is no evidence as to the racial composition of the jury, if Ms. Thomas was African-American, counsel may have decided her race or gender was a more important factor than this concern.

Claim 8(e) is denied.

41. Movant called Greg Chatten as a witness. Mr. Chatten is a forensic computer analyst who reviewed the hard drive of Mr. Lape's computer. He has some college training, but most of his experience has been on the job. He was originally hired to work on behalf of co-defendant Justin Brown. He cannot prove who created the profile attributed to Mr. Lape, and he cannot actually testify which computer was used to create the profile. A different YAHOO! profile with the name "prisoner" has Mr. Lape's picture, but the profile used to engage in the instant message chats concerning Megan cannot be attributed to Mr. Lape.

Mr. Chatten testified in several instances as to when the images he obtained were

"accessed," but then testified he could not determine when these images were viewed. Detective James testified that one can, in fact, make such a determination and the Court finds this to be true. Whether based on a bias or lack of knowledge, Mr. Chatten's testimony otherwise is not true and not credible. Mr. Chatten could not testify or otherwise establish that the images or chats were associated in any way with Mr. Lape, other than that they were in Mr. Lape's computer.

42. The State called Detective David James. His testimony was also introduced by the Movant through deposition. Detective James testified that the YAHOO! account was created in October of 2001, but was never used until July 2, 2002. Someone attempted to delete those chats on July 2, 2002. But, after Mr. Lape's death, someone used that profile to engage in additional instant messaging. Detective James did identify the picture in the "prisoner" profile as Mr. Lape, but that was not the account used for any of the chats.

Detective James also testified that the Encase software does detect when downloaded items are accessed. He testified conclusively that the pornography on the computer was never accessed during the time period Movant was in the Lape home. He testified that the investigation recovered several pictures of Movant's daughter at the Lape home.[1] Detective James also testified that following Mr. Lape's murder, Movant and Mr. Brown purchased $300 worth of pornographic movies off of Mr. Lape's satellite dish.

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[1] At the time, the Court did not understand the relevance of this evidence. The Court now recognizes that the State believes it would be inconsistent for Movant to have believed Mr. Lape was a pedophile, and yet have his young daughter in that home.

The agreement was in exchange for Movant providing information about an attorney, Pat Davis. Mr. Estes identified several file memos that memorialized conversations Mr. Estes had with witnesses and Movant. The memos (Estes deposition Exhibits 1-12), demonstrate that a plea of life was hoped for, but never promised by the State at any point. For example, Deposition Exhibit 11, written by Dee Berman, states that Movant "is hoping this may bring an offer of LWOP, if he cooperates."

Dee Berman's testimony was also presented through deposition. She was in the Capital Litigation Division of the Public Defender's Office for over five years. She handled between 15 and 18 capital cases. She was also Movant's original trial attorney. Movant called Ms. Berman often. Ms. Berman was the lead attorney and had more contact with the prosecutor, Morley Swingle. She tried hard to get the State to agree to not seek the death penalty. She thought a plea was likely. Ms. Berman did hire a psychologist to evaluate the Movant. Ms. Berman had three to four total cases at the time. Mr. Swingle never did make a plea offer to Movant.

CONCLUSIONS OF LAW

44. CLAIM 8(A) – ALLEGED FAILURE OF PROSECUTION TO DISCLOSE ALLEGEDLY EXCULPATORY MATERIAL BY NOT DISCLOSING EXISTENCE OF CHILD PORNOGRAPHY ON THE VICTIM'S HOME COMPUTER

In his first point, Movant claims the prosecution violated his constitutional rights by intentionally failing to disclose to the defense that the murder victim's computer contained

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house in his underwear.

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files containing illegal child pornography. Movant claims this information could have made a difference in the outcome of his trial. This court disagrees. The existence of the child pornography on the victim's computer was irrelevant to all issues in the trial. The failure to disclose this information, for whatever reason, could not have affected his trial.

45. CLAIM 8(B) - INEFFECTIVENESS OF DEFENSE COUNSEL FOR FAILING TO LEARN ABOUT EXISTENCE OF CHILD PORNOGRAPHY ON THE VICTIM'S HOME COMPUTER

Movant claims ineffective assistance of counsel on the part of his trial lawyers for failing to find out about the existence of child pornography on the home computer of the murder victim, Ralph L. Lape, Jr. The existence of the child pornography on the victim's computer was irrelevant to all issues in the trial. The failure to learn about the irrelevant material, for whatever reason, could not have affected Movant's trial.

46. CLAIM 8(C) - CLAIM THAT PROSECUTOR DELIBERATELY TRICKED DEFENSE COUNSEL INTO NOT PREPARING FOR TRIAL BY LEADING THEM TO BELIEVE HE WOULD WAIVE THE DEATH PENALTY

Movant's claim that the prosecutor deliberately misled the defense lawyers into not preparing for trial by making intentional misrepresentations to them that "a deal was a real possibility in this case" is completely refuted by the testimony of the witnesses at the hearing. Furthermore, the record is clear that the defense attorneys did prepare for the case and tried it in a professional manner.

47. CLAIM 8(D) - INEFFECTIVENESS OF COUNSEL IN PERMITTING CHANGE OF VENUE TO NEW MADRID COUNTY

Movant claims his trial lawyers were ineffective for allowing his case to be tried in New Madrid County. He claims his first two lawyers, Jeffrey Estes and Delores Berman, were ineffective for carrying out Movant's express wishes of having the venue changed to the county where he had grown up. He also claims his subsequent attorneys, Sharon Turlington and David Kenyon, were ineffective for failing to "develop and present" evidence that Movant could not receive a fair trial in New Madrid County. The jury selection process in this case weeded out jurors who could not be fair to both sides in the trial. Movant has failed to show that he could not receive a fair trial in New Madrid County.

48. CLAIM 8(E) - INEFFECTIVENESS FOR FAILING TO STRIKE JUROR DIRETHA MOORE THOMAS FOR CAUSE

Movant has failed to show that his trial counsel rendered ineffective assistance of counsel for failing to move to strike juror Diretha Moore Thomas.

49. CLAIM 8(F) - INEFFECTIVENESS FOR FAILING TO HIRE A MITIGATION SPECIALIST AND FOR NOT THOROUGHLY INTERVIEWING PENALTY PHASE WITNESSES

Movant has failed to show that his trial counsel rendered ineffective assistance of counsel by failing to hire a "mitigation specialist" or by not being sufficiently thorough in their preparation of penalty phase witnesses.

50. CLAIM 8(G) - INEFFECTIVENESS IN FAILING TO INVESTIGATE SOCIAL HISTORY WITNESSES FOR PENALTY PHASE

Movant has failed to show that his trial counsel rendered ineffective assistance of

counsel by failing to interview additional witnesses to testify about Movant's childhood. He has failed to meet his burden of proof that additional witnesses Gary Riley, Jim Mills, Mr. and Mrs. Arvil Skinner, Cheri Rone, Carol Underwood, Phil Newman, Louise Tipler, Larones Nelson, and John Terry would have provided testimony that would have made a difference in the outcome of his trial. Their testimony would have been cumulative. It is not ineffective assistance of counsel to fail to present cumulative evidence. *State v. Carter*, 955 S.W.2d 548, 555 (Mo. banc 1997).

51. CLAIM 8(H) - INEFFECTIVENESS FOR FAILING TO HIRE PSYCHOLOGIST DONALD CROSS

Movant presented the testimony of an expert, Dr. Wanda Draper, at trial. He now claims his attorneys were ineffective for failing to hire a different psychologist, one Donald Cross. Movant has failed to establish that Cross would have done a better job than Draper at his trial. Movant has failed to meet his burden of proof that not hiring Cross made a difference in the outcome of his trial.

52. CLAIM 8(I) - INEFFECTIVENESS FOR FAILING TO HIRE CASSIE ALFONSO, A CULTURAL MITIGATION SPECIALIST

Movant claims his trial lawyers were ineffective for failing to hire a "cultural mitigation specialist" named Cecilia Alfonso. Movant has failed to meet his burden of proof that the testimony of this witness would have made a difference in the outcome of his trial.

53. CLAIM 8(J) - INEFFECTIVENESS FOR FAILING TO PRESENT TESTIMONY IN PENALTY PHASE ABOUT MOVANT'S COOPERATION WITH AUTHORITIES IN OTHER INVESTIGATIONS

Movant claims his trial lawyers were ineffective for failing to present evidence to the jury about his cooperation with authorities regarding other criminal investigations. What Movant fails to note is that his cooperation specifically involved other crimes and swindles he had participated in. The prosecution had agreed not to bring this other bad conduct to the attention of the jury and kept that promise. Counsel was certainly not ineffective for failing to open the door to this bad conduct evidence themselves. Movant failed to present any evidence that he "cooperated" with authorities and it is quite obvious that, to the extent he attempted to do so, Movant's only motivation was self-interest. This evidence would not have been helpful.

54. CLAIM 8(K) - UNCONSTITUTIONALITY OF RULE 29.15

Movant claims Rule 29.15 is unconstitutional in that it fails to provide reasonable access to the courts because of "unreasonably short time limitations." This issue has already been ruled upon by the Missouri Supreme Court, which held that the time limitations established by Rule 29.15 are constitutional, even in death penalty cases. *State v. Carter*, 955 S.W.2d 548, 562 (Mo. banc 1997).

55. CLAIM 8(L) - CONSTITUTIONALITY OF DEATH BY LETHAL INJECTION

Movant claims that death by lethal injection is unconstitutional. The Missouri Supreme Court has already rejected this claim. In order to state a viable claim, the Movant

must allege facts that tend to show that there is a problem of administration of the death penalty by lethal injection that is likely to occur again in Missouri. *Williams v. State*, 168 S.W.3d 433, 446 (Mo. banc 2005). Movant has failed to meet his burden of pleading and proof on this issue.

PRO SE MOTION

This Court has also reviewed the Movant's original *pro se* motion filed in this matter and hereby finds that it raises no other issues not already addressed by these findings of fact and conclusions of law.

WHEREFORE, in that the Movant has failed to carry his burden of proof upon any of the claims made in his Motion, it is hereby ORDERED, ADJUDGED and DECREED, that the Motion to Vacate, Set Aside or Correct the Judgment or Sentence be and hereby is DENIED.

_____ Date

_____
J. Max Price
Circuit Court Judge

Assistant Attorney General Theodore Bruce. Mr. Swift also requested that I search that casefile for any correspondence from Assistant Attorney General Bruce that in any way related to him submitting or having submitted Proposed Findings of Fact and Conclusions of Law on behalf of the State of Missouri.

3. I have searched on August 4, 2009, the entire *Gill v. State* casefile and I have not found any Proposed Findings of Fact and Conclusions of Law, submitted by the Office of the Missouri Attorney General through Assistant Attorney General Bruce and on behalf of the State of Missouri.

4. I have searched on August 4, 2009, the entire *Gill v. State* casefile and I have not found any correspondence from Assistant Attorney General Bruce that in any way related to him submitting or having submitted Proposed Findings of Fact and Conclusions of Law on behalf of the State of Missouri.

Further, affiant saith naught.

Vicki Simpson

Subscribed and sworn to before me a notary public this 5th day of August, 2009.

Notary Public

My Commission Expires: 6/3/2011

MARY CYNTHIA STARNES
Notary Public - Notary Seal
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New Madrid County
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August 24 , 2009

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In re: Mark Anthony Gill, Appellant, vs. State of Missouri, Respondent.
Missouri Supreme Court No. SC89831

Dear Mr. Swift:

Please be advised that the Court entered the following order on this date in the above-entitled cause:

> "Appellant's motion filed on August 13, 2009, ordered treated as a motion to deposit attachments to said motion as exhibits and sustained subject to the Court's future determination as to the appropriateness of considering the same. Letter dated September 8, 2008, from Theodore A. Bruce and proposed findings of fact and conclusions of law designated as Appellant's exhibit 98. Attached affidavit of New Madrid County Deputy Clerk Vicki Simpson designated as Appellant's exhibit 99."

Yours very truly,

THOMAS F. SIMON

Kathy K. Fletchall

Kathy K. Fletchall
Deputy Clerk, Court en Banc

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cc: Mr. James B. Farnsworth

SUPREME COURT, U.S.
FILED
JUN 22 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 09-1327

STATE OF MISSOURI,

Petitioner,

v. **CAPITAL CASE**

MARK GILL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

Because the state has failed to include a number of relevant and probative facts which facts establish that trial counsel's failure to review police report discovery provided to them by the state was unreasonable and prejudicial and has distort[illegible] what the Missouri Supreme Court actually decided, respondent presents its own statement of relevant facts.

I. Relevant Facts of the Offense

Mark Gill and his co-defendant Justin Brown were convicted in separate trials of the first degree murder of Ralph Lape. *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005) and *State v. Brown*, 246 S.W.3d 519 (Mo. App., S.D. 2008). The state sought death against both, but only obtained death against Gill. Lape had lived alone before Gill began living with Lape (T.Tr.636). Gill and Brown abducted Lape. Each claimed that the other shot Lape. *State v. Gill*, 167 S.W.3d at 188; *Brown*, 246 S.W.3d at 530. After Lape's death, they used Lape's ATM card to make purchases (T.Tr.731-36). They used Lape's computer to transfer money from one of Lape's bank accounts to another so that the money could be accessed using Lape's ATM card (T.Tr.729-36,828). When the New Mexico Highway Patrol stopped the car Gill was riding in and arrested Gill, he had with him Lape's ATM card and Lape's computer hard drive(T.Tr.822,876-89,961-65).

II. The State's Trial Evidence and Arguments

In Cape Girardeau County Prosecuting Attorney Swingle's guilt phase opening statement, he told the jury that victim Ralph Lape had been "a [G]ood [S]amaritan" who had afforded Mr. Gill the opportunity to live on his property because Gill "was down and out and needed a place to stay" (T.Tr.587).[1] During initial guilt closing argument, Swingle argued that Lape "had given this man a place to stay, a roof to have over his head," and that resulted in his death (T.Tr.1084).

In penalty phase Lape's sister, Diane Miller, testified that without Swingle's request, she had prepared a photo album that she brought him because she "wanted [Swingle] to see the person" he represented (T.Tr.1171). There were many pictures of Lape with his daughter, Megan. Those pictures included and highlighted: (1) at the hospital with Megan the day she was born (T.Tr.1173); (2) Megan's first day of school when Lape had gotten her ready (T.Tr.1174); and (3) two pictures from Megan's high school graduation (T.Tr.1183). Lape's daughter Megan testified that someday she would get married "and I won't have my dad to walk me down to the aisle and tell me how proud he is of me" (T.Tr.1225).

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[1] At trial, the state was represented by local county prosecutor Swingle. At all other relevant times since, the state has been represented by the Missouri Attorney General's Office.

Diane testified that Lape went to St. Ambrose Catholic School (T.Tr.1170). Lape was not the type of person who "gossip[ed]" about people (T.Tr.1184).

Diane read a prepared statement (T.Tr.1185). That written statement included Lape was the eldest, "the example for all the rest," and shouldered that responsibility "never complaining" while highlighting Lape's generosity (T.Tr.1186,1190). Diane read: "the proudest and happiest day of Ralph's life was the day his daughter Megan was born" (T.Tr.1187). Lape behaved like "Mr. Mom" (T.Tr.1187). Diane's husband, Mitch Miller, testified that he had studied with Lape the "valuable good life lessons" of the old west culture and characters (T.Tr.1195).

Lape's brother Steven Lape read a prepared statement (T.Tr.1218). Steven described how Ralph Lape's school teachers had held him in high regard (T.Tr.1220). Steven testified that after Lape's death he learned "how generous" Lape had been having paid for a friend's wife's funeral (T.Tr.1221). Steven concluded his testimony invoking a quote from Lincoln's Gettysburg address as epitomizing Lape's character (T.Tr.1221-22). The Lincoln quote was: "The world will little note, or long remember what we say here. But they will never forget what we did here" (T.Tr.1221-22).

III. The Postconviction Case

Gill was represented at trial by two attorneys from the Missouri Public Defender's Capital Case Defense Office, David Kenyon and Sharon Turlington.

Both Kenyon and Turlington had substantial capital case experience (29.15Tr.112-15, 273-75).

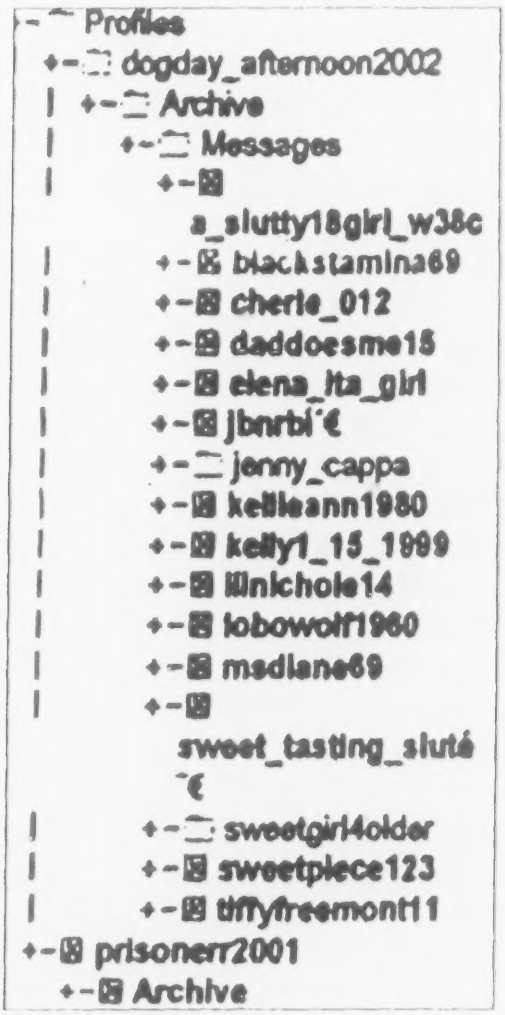
Police Officer David James was listed in discovery that was provided as the "officer in charge" of the investigation (29.15Tr.148). James prepared the probable cause to charge statement which recited that the car Gill was arrested in "had Lape's computer in the car" (29.15Ex.69). Swingle filed an information that listed James as a state's witness (29.15Ex.67-68;29.15Tr.126-28). Throughout the police report discovery that was provided to counsel, James' name was repeated (29.15Tr.129-53). It was Officer James who obtained consent to search Lape's computer from Lape's sister Diane (29.15Tr.142-43). In Prosecutor Swingle's Answer to Request For Discovery, he listed Lape's computer as something he might introduce (T.L.F.91;29.15Ex.95 at 20-21).

Counsel never interviewed and never deposed Officer James (29.15Tr.123-24,295-96;29.15Ex.69). During a pretrial deposition Kenyon took of a witness who owned lakehouse property with Lape, Kenyon explained to that witness he "like[s] to take depositions of anybody that has **any kind of familiarity** with the case **at all**...." (29.15L.F.403 transcript at p.4) (emphasis added).

Officer James prepared an Encase report of an analysis he did of Lape's computer and that report was disclosed to Gill's counsel (29.15Tr.176-77;29.15Ex.15 at 5125). Page 1 of the Encase report stated that the Encase information "was acquired by Lt. David James" (29.15Ex.15 at 5125).

Counsel for respondent apologizes for having to present in detail the disgusting, shocking content of the sexual material Lape put on his computer. Counsel does not believe, however, that this Court can fully appreciate how the state misrepresented Lape's character to the jury without doing so. Moreover, counsel does not believe this Court can truly appreciate the impact this evidence would have had on the outcome of the penalty phase without being informed of the details of the child pornography, Lape's chats about his daughter's anatomy and his attraction for it, and other sexually explicit material.

File names, as they appeared, in Officer James' Encase report included:



(29.15Ex.15 at 5128). James knew from reviewing Lape's computer and preparing his Encase report that there was much pornography, including child pornography, on Lape's computer (29.15Ex.93 at 22-24).

Kenyon reviewed the Encase report before trial and did not notice anything that alerted him there was pornography on Lape's computer (29.15Tr.167-69).

Since trial Kenyon has reviewed the Encase report more closely and there were entries whose names should have alerted him to the possibility of pornography on Lape's computer (29.15Tr.167-69;29.15Ex.15 at 5128). Turlington testified similarly (29.15Tr.303).

At Gill's postconviction hearing, computer expert Chatten, who uncovered Lape's computer's sexual content for the co-defendant's counsel, testified about what he found on Lape's computer. Lape's computer contained the Yahoo profile "dogday____afternoon2002" (29.15Tr.613). That profile displays a standing white male with his erect penis exposed from the navel downward (29.15Tr.613-14;29.15Ex.92). The "real name" appears as "Ralph" (29.15Tr.614). Listed as "hobbies" were the following: "boating, fishing, camping, socializing with friends, drinking beer on my boat, and … Oh, and sex, all kinds, except I don't do men. So guys don't ask." (29.15Tr.614).

Lape's computer also contained a profile "prisonerr2001" (29.15Tr.617). This profile contains a facial picture with the name "Ralph" (29.15Tr.617). That profile states as "hobbies:" "fishing, boating, camping sex. No males, just females, one or more okay"(29.15Tr.618). Favorite quote is "want to" (29.15Tr.618).

There were several relevant chats by Lape as "dogday____afternoon2002." The entire chat "lobowolf1960" done by Lape was as follows:

dogday_afternoon2002 (11:44:45): yes, but my daughter lives with her mom
dogday_afternoon2002 (11:44:51): how about you
unknown (11:44:54): how old is she?
unknown (11:45:00): i have a 17 year old daughter
dogday_afternoon2002 (11:45:08): mine is 17 too
unknown (11:45:21): she pretty hot?
unknown (11:45:44): ?
dogday_afternoon2002 (11:45:53): you bet, really stacked
dogday_afternoon2002 (11:45:56): yours
unknown (11:46:19): same here...5'7"...140..blonde hair....long legs...blue eyes...that tight teen girl ass...38c
unknown (11:48:22): yours?
dogday_afternoon2002 (11:47:31): dirty blonde, blue eyes, 59" I dont know her weight but she has terrffic tits
unknown (11:47:49): MMMMMmmmmmmmmmm...my daughter is cory.....your daughters name?
dogday_afternoon2002 (11:47:57): megan
unknown (11:48:12): megan have a nice ass??
dogday_afternoon2002 (11:48:31): yes really tight and firm and round
unknown (11:48:43): how often you get to see her?
dogday_afternoon2002 (11:48:57): bout 1once a week
unknown (11:49:15): does she ever wear short shorts...shorts skirts when she is around you??
unknown (11:49:27): cory does al of the time.....drives me nuts....
dogday_afternoon2002 (11:50:03): mine too, and those little half tops, her tits are so big, they wont hardly stay in
unknown (11:50:24): mmmmmmmmmmmmmmmmmmm...she like to give you nice views of her tits??
dogday_afternoon2002 (11:51:01): yeh, she teases me alot, how about cory
unknown (11:51:49): oooohhhhhhhhhyes ...sh eloves showing off her ass..she is a swimmer and her ass is soooooooooo smooth and firm....and those tits.....man....so firm and big.....gets me hard just thinking of them..
unknown (11:52:01): you ever jo thinkg about megan??
unknown (11:52:36): maybe??
dogday_afternoon2002 (11:52:49): all the fucking time
dogday_afternoon2002 (11:52:57): you ever messed with cory
unknown (11:53:20): she has let me jo on her tits ...and ass cheeks ..we just started.....you and megan do anything?
unknown (11:53:52): you there?
dogday_afternoon2002 (11:54:13): mmmmmmmmmmmmmmmmmmmmmm
dogday_afternoon2002 (11:54:26): corry, like you suckin on her tits
unknown (11:54:38): yesssssssss.....you and megan do much??
dogday_afternoon2002 (11:55:05): just touchy feely things, but I sure want more
unknown (11:55:29): are you hard right now??
dogday_afternoon2002 (11:55:51): working on it, LOL
dogday_afternoon2002 (11:56:02): does cory live with you
unknown (11:56:15): yes
unknown (11:56:29): ever get a nice close view of megans ass???
dogday_afternoon2002 (11:56:58): yeh, she lays on the floor and watches, TV nice shot of her ass then
unknown (11:57:17): what doess he wear doing that????
unknown (11:57:36): cory does the same thing...that is how i started jo on her ass cheeks
dogday_afternoon2002 (11:57:38): usually shorts
dogday_afternoon2002 (11:57:46): sometimes her panties
unknown (11:57:55): you get hard looking at that????
dogday_afternoon2002 (11:58:11): hell, yes, wouldnt you
unknown (11:58:32): yesssssssssssss...does she know that???
dogday_afternoon2002 (11:58:54): well, I dont know, I try to be pretty careful
dogday_afternoon2002 (11:59:01): you ever seen cory in her panties
dogday_afternoon2002 (12:00:54): is cory home now
dogday_afternoon2002 (12:01:50): ok then

(29.15Ex.11 at 3855-56).

Lape's entire chat of "daddoesme15" was as follows:

dogday_afternoon2002 (18:31:51): hi baby girl
dogday_afternoon2002 (18:31:59): you like dads cock

(29.15Ex.11 at 3850).

Lape's chat about his prior involvement with 13 and 15 year old girls in "sweetpiece123" included:

dogday_afternoon2002 (18:34:10): you ever been with older guy for real
unknown (18:34:15): yep
dogday_afternoon2002 (18:34:31): cool
unknown (18:34:42): u ever ben with a younger girl for real?
dogday_afternoon2002 (18:34:52): yes
dogday_afternoon2002 (18:34:57): a couple of them
unknown (18:34:58): kewl
unknown (18:35:04): how old?
dogday_afternoon2002 (18:35:22): 13 and 15
unknown (18:35:34): kewl ur girls?
dogday_afternoon2002 (18:35:55): no a neighbor girl and her friend
unknown (18:36:06): hot
unknown (18:36:19): u still do them?
dogday_afternoon2002 (18:36:27): you bet, they have the sweetest little pussies

(29.15Ex.11 at 3857)

Additionally, during "sweetpiece 123," Lape had the following exchange:

unknown (18:47:58): i need a hard cock
dogday_afternoon2002 (18:48:02): did you see my pic on profile

(29.15Ex.11 at 3858).

Lape's computer contained child pornography of young girls with penises in their vaginas and penises in their mouths, along with child pornography of

young girls exposing their breasts and genitalia (29.15Tr.622-28). The file names of such child pornography included: (1) "cumshower.jpg"; (2) "10ondad.jpg" and (3)

"fuck_hardcore_Asian_sex_suck_fucking_gum_animals_gay_lesbian_dog_cat_fish_chicken_horse_good_music_blur_oasis_swayed (1.jpg)" (29.15Tr.623,625-26).

Lape's hard drive contained twenty-nine movies whose file names depicted bestiality (29.15Tr.628-29). Those names included: "pretty teen girl gets anal sex from dog," "animal sex horse rape," "bestiality dog cums on woman's face," and "animalpornmovie – bestiality – prettyteengirlgetsanal.mpg" (29.15Tr.629-30).

From his pretrial computer investigation, Officer James concluded Lape authored the sex chats and not someone else sitting at Lape's computer (29.15Ex.93 at 26). James had known Lape before his death, and concluded from his review of Lape's computer that Lape was "a pervert" (29.15Ex.93 at 38-39).

James testified there was nothing in Lape's computer to link Gill to placing child pornography on it (29.15Ex.93 at 48). James determined that the pornography was placed on Lape's computer before Gill began living with Lape, and therefore, Gill could not have placed it there (29.15Ex.93 at 48). James testified that the sexual images on Lape's computer were last accessed before Gill lived with Lape (29.15Tr.646-47). If James would have found any evidence to connect Gill or co-defendant Brown to placing illegal pornography on Lape's computer, then he would have alerted the prosecutor (29.15Ex.93 at 48-49).

James' Encase report was disclosed to co-defendant Brown's counsel (29.15Ex.93 at 20-21). Lape's hard drive's contents were not put on a disc until Brown's counsel requested them (29.15Ex.93 at 32-38,45-46).

Swingle testified that he filed a motion in Brown's case to exclude all Lape's computer's sexual content as irrelevant (29.15Ex.95 at 44-47). Swingle testified that the trial court in *Brown* ruled that the defense could not present Lape's computer's contents unless the victim impact cast Lape as "a saint" (29.15Ex.95 at 46-47).

Swingle testified that in *Brown*, no evidence was presented that opened the door to the computer evidence (29.15Ex.95 at 46-47). Swingle alerted the victim impact witnesses not to cast Lape as "a saint" or the sexual content evidence would be admissible (29.15Ex.95 at 48-52,68).

Kenyon thought the state painted Lape in penalty as "a saint" (29.15Tr.172-74). Kenyon believed that the child pornography, video bestiality, and on-line chats would have "cast [Lape] in a much different light than what the State was trying to paint in the penalty phase" (29.15Tr.171).

Turlington testified Lape's sexual chats could have been used to rebut the state's portrayal of Lape as a person of great character and would have rebutted the state's portrayal of Lape as an exemplary father (29.15Tr.307).

Turlington testified that the child pornography evidence and evidence that suggested Lape was sexually involved with 13 to 15 year old girls would have

rebutted the state's portrayal of Lape as a person of great character and upstanding citizen (29.15Tr.307-08). Turlington would have wanted to selectively present the assorted sexual content (29.15Tr.318,334).

The postconviction court signed the Attorney General's findings (29.15Tr.666;29.15L.F.510-43). The Attorney General's findings asserted that the sexual content on Lape's computer could be attributed to Gill and that there was no evidence establishing Lape was responsible for Lape's computer's sexual contents (29.15L.F.514,521-22,526,532-33,535-37). *See* Opposition to Cert. Appendix at A48, A55-A56, A60, A66-A67, A69-A71. The Attorney General's findings were signed even though James, the state's computer expert and officer in charge, had concluded Lape authored the sexual chats, James' overall review of Lape's computer had caused him to conclude Lape was "a pervert," and James determined the pornography on Lape's computer was put on Lape's computer before Gill lived with Lape (29.15Ex.93 at 26,38-39,48).[2]

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[2] Throughout its petition, the state characterizes the postconviction findings as those of the postconviction court. Mr. Gill has filed his own petition for certiorari challenging the fundamental fairness of him being denied guilt phase relief when the postconviction judge signed the Attorney General's findings when the state's own police officer computer witness testified victim Lape, and not Gill, put the

In the state's Missouri Supreme Court brief, it argued that Gill's claim, that the postconviction proceedings were fundamentally unfair because the postconviction judge signed the state's findings should not be reviewed because the Attorney General's Proposed Findings were not part of the appellate record (Resp. Br. 48). In response, Gill filed a motion with the Missouri Supreme Court requesting that it accept as part of the record on appeal a copy of the Attorney General's Proposed Findings that was served on counsel who represented Gill in the trial level postconviction court. *See* Opposition to Cert. Appendix at A78-A86. Attached to that motion was a copy of the Attorney General's findings that was served on Gill's trial level postconviction counsel. *See* Opposition to Cert. Appendix at A89-A123. That motion set forth that the reason the appellate record did not contain a document labeled as "Proposed Findings" was the Attorney General had submitted a document denominated as "Findings" with lines left blank for the postconviction judge to insert the date along with the judge's signature, which was exactly what that judge did. *See* Opposition to Cert. Appendix at A81-82. That motion set forth that undersigned counsel had compared side by the side the Attorney General's Proposed Findings with the findings the postconviction judge had signed which showed that the

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inappropriate sexual content on Lape's computer. *See Gill v. Missouri* No. 09-11094.

postconviction judge had signed verbatim the state's findings, as submitted by the Attorney General. *See* Opposition to Cert. Appendix at A81-82.

In response to Gill's motion, the Missouri Supreme Court entered an order designating the Attorney General's Proposed Findings that were served on trial level postconviction counsel as Exhibit 98. *See* Opposition to Cert. Appendix at A126. That order stated that Gill's motion was "sustained subject to the Court's future determination as to the appropriateness of considering the same." *See* Opposition to Cert. Appendix at A126.

On direct appeal, Gill had argued that the victim impact evidence presented exceeded the bounds that this Court had authorized in *Payne v. Tennessee*, 501 U.S. 808 (1991). *State v. Gill*, 167 S.W.3d 184, 195-97 (Mo. banc). The Missouri Supreme Court rejected that claim and noted that "the Millers' discussion of their family's moral values was permissible in that it explained the values held by Mr. Lape." *State v. Gill*, 167 S.W.3d at 196.

The Missouri Supreme Court found that counsels' performance was deficient because they saw the file names on the disclosed Encase report suggesting sexual content, but took no action to investigate what they saw. *Gill v. State*, 300 S.W.3d 225, 233 (Mo. banc 2009). The computer was relevant because it was used to transfer money from Lape's accounts so the money could be accessed with his ATM card. *Id.* at 228 n.2. The Court also found that in light of Officer James' role in preparing the probable cause statement and authoring the

Encase report and his endorsement as a witness, reasonably competent counsel would have interviewed or deposed James. *Id.* at 233. Interviewing or deposing James would have led to discovery of the sexually explicit material because James knew what was on Lape's computer. *Id.* at 233.

Gill was prejudiced because Lape's computer's contents either could have been used to rebut the state's good character evidence or could have been used to dissuade the state from presenting the good character evidence. *Gill v. State*, 300 S.W.3d at 234. Prejudiced was also established because co-defendant Brown's counsel had access to the same information as Gill's counsel, but Brown's counsel uncovered the computer's sexual content and used that knowledge to prevent the state from presenting good character evidence about Lape and Brown was sentenced to life. *Id.* at 230-31, 234.

In finding counsel was ineffective, the Missouri Supreme Court necessarily did not defer to the Attorney General's findings that the postconviction judge signed that Gill, rather than Lape, was responsible for Lape's computer's sexual content, otherwise, it could not have found that counsel was ineffective for failing to uncover Lape's computer's sexual content.

REASONS THE WRIT SHOULD BE DENIED

I. Rebuttal to Victim Impact Is Presumptively Admissible Under This Court's And The Missouri Supreme Court's Decisions

The state's petition is nothing more than a request for error correction, when no error occurred. In fact, the Missouri Supreme was true to what this Court has held as to a defendant's right to rebut victim impact with relevant rebuttal evidence.

The Missouri Supreme Court simply applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) to a truly unique fact situation. The Missouri Supreme Court established no general rules for investigating "bad victim" evidence or even the presentation of "bad victim" evidence. The Missouri Supreme Court only decided that counsels' failure to review discovery the state provided to them which established that the victim was, in the words of the state's police officer computer expert a sexual "pervert" in a case where the victim was portrayed as a "saint" was unreasonable and the failure to discover that evidence was prejudicial. In light of the content of the evidence and the co-defendant not being sentenced to death, a trial in which counsel did review the discovery and used it to limit victim impact evidence, neither determination was in the least bit remarkable, much less cert-worthy.

Petitioner argues that the evidence Lape had inappropriate sexual content on his computer was presumptively inadmissible because Gill was not allowed "to smear the vicim's character" during penalty phase in order to "suggest the victim deserved to die." (Petition at 10, 15). Petitioner further argues that what the Missouri Supreme Court required of counsel will now result in victims being

"harangued by zealous investigators." (Petition at 17). None of what petitioner asserts is true.

Evidence that rebuts the state's victim impact evidence is **presumptively admissible** under the decisions of this Court. In *Booth v. Maryland*, 482 U.S. 496, 501-02 (1987), this Court held that the Eighth Amendment prohibited the admission of victim impact evidence. In *Payne v. Tennessee*, 501 U.S. 808, 811, 825 (1991), this Court overruled *Booth* to the extent that *Booth* created a per se Eighth Amendment prohibition against victim impact. The *Booth* dissenting Justices, who favored allowing victim impact evidence, stated that "**[n]o doubt** a capital defendant **must be allowed to introduce relevant evidence in rebuttal** to a victim impact statement, but Maryland has in no wise limited the right of defendants in this regard." *Booth*, 482 U.S. at 518 (emphasis added) (opinion of White, J. joined by Rehnquist, C.J., O'Connor, J. and Scalia, J.). *See also Simmons v. South Carolina*, 512 U.S. 154, 164 (1994) (post *Payne* decision holding where state relies on particular evidence to ask for death "elemental due process principles operate to **require admission** of the defendant's relevant evidence in **rebuttal**") (emphasis added). *Payne* adopted the *Booth* dissenting Justices' views as the Court's new majority view. *Payne*, 501 U.S. at 851 (Marshall, J. dissenting). The *Booth* dissenters did note that counsel's decision whether to rebut victim impact evidence or not is not an easy one. *Booth*, 482 U.S. at 518 (White, J. dissenting).

The Missouri Supreme Court's opinion noted that generally neither the state nor the defense is allowed to introduce character evidence about the victim. *Gill v. State*, 300 S.W.3d at 232 (citing *State v. Hall*, 982 S.W.2d 675, 681 (Mo banc 1998)). In *Hall*, unlike here, the state had not injected in the first instance the victims' character. *Hall*, 982S.W.2d at 681. What the Missouri Supreme Court has held in decisions like *Hall* was that a defendant **cannot initiate injecting** evidence of the victim's bad character. In Gill's case, in contrast, the state, through its victim impact witnesses, injected in the first instance that Lape was a person of sterling morals, exceptional integrity, and an extraordinary father worthy of being described as a "Mr. Mom."

What the Missouri Supreme Court recognized in *Gill* was that through injecting Lape's character in the victim impact evidence, the state had "open[ed] the door for the defense to present rebuttal character evidence." *Gill v. State*, 300 S.W.3d at 233. The Missouri Supreme Court has consistently recognized that any competent evidence that explains, counteracts, repels, or disproves evidence of one party can be offered as proper rebuttal by the other party. *State v. Gardner*, 8 S.W.3d 66, 72 (Mo. banc 1999). Lape's computer's sexual content counteracted, repelled, and disproved that Lape was a person of high morals and exceptional integrity. The computer's content counteracted, repelled, and disproved Lape possessed the character and integrity of the "Good Samaritan," a "saint," "Mr. Mom," and a Lincolnesque character. A person who possessed such qualities

would not have child pornography on his computer, would not have boasted on-line to having engaged in sex with minors, would not have solicited on-line sex with minors, created a profile posting his erect penis, and created profiles that listed as his "hobbies" sex of all kinds. "Mr. Mom" would not engage in on-line sexual chats about his sexual attraction for his daughter's anatomy. All this evidence rebutted petitioner's portrayal of Lape as a person of sterling character and it was presumptively admissible evidence as rebuttal evidence. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.* Moreover, Lape's computer's contents was proper rebuttal because the Missouri Supreme Court ruled on direct appeal that the state's victim impact was proper because "the Millers' discussion of their family's moral values was permissible in that it explained the values held by Mr. Lape." *State v. Gill*, 167 S.W.3d at 196.

The Missouri Supreme Court has recognized that it is improper for the state to focus in penalty on the "relative worth" of a victim. *State v. Wise*, 879 S.W.2d 494, 516 (Mo. banc 1994) (rejecting claim of improper prosecutorial argument because it did not get into the victim's "relative worth"). An inherent problem that has been recognized with victim impact evidence is that it creates two classes of victims, those whose lives are "so worthwhile" such that their killing is more aggravated so as to cast the defendant as "more deserving" of death, and those whose lives were "not as worthwhile" such that their killing is less aggravated making the defendant "less deserving" of death. *See Hayward v. State*, 24 So.3d

17, 41-43 (Fla. 2009) (prosecutor's argument comparing the character and personal choices of victim to the defendant's character and personal choices was improper); *State v. Gentry*, 888 P.2d 1105, 1166-67 (Wash. banc 1995) (Johnson, J. dissenting) (victim impact evidence creates situation where punishment decision is influenced by whether the defendant "killed a "worthy" member of society or a less "worthy" citizen"); *Windom v. State*, 656 So.2d 432, 440-41 (Fla. 1995) (Kogan, J concurring and dissenting) (courts should not encourage the use of victim-impact evidence to "invite jurors to gauge the relative worth of particular victims' lives."). When the state injected here evidence that Lape was a person of sterling character, outstanding personal morals, and a "Mr. Mom" in character, it sought to create for the jury the dichotomy that Lape was a person whose life was so highly valued in our society's values system that Gill's offense was that much more aggravated and Gill was that much more deserving of death. The Missouri Supreme Court properly recognized that had counsel not been ineffective they were entitled to rebut the state's evidence that this offense was more aggravated because Lape was a salt of the earth person of impeccable character. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.* The Missouri Supreme Court did not sanction any notion that the kind of evidence that could have been admitted was proper to establish Lape "deserved to die." (*See* Petition at 15).

In deciding Gill's counsel was ineffective, the Missouri Supreme Court began its analysis by setting forth this Court's standards for evaluating

effectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Gill v. State*, 300 S.W.3d at 232. In particular, Gill was required to establish counsel's performance was deficient. *Gill v. State*, 300 S.W.3d at 232. The Missouri Supreme Court noted that "[c]ounsel's performance is deficient if it falls below an objective standard of reasonableness, as measured by prevailing professional norms." *Id.* at 232. The second prong of *Strickland* required that Gill was prejudiced. *Id.* at 232. The Missouri Supreme Court noted that under *Strickland* prejudice exists if there is a reasonable probability that but for counsel's deficient performance the jury would have recommended life rather than death. *Id.* at 232.

The Missouri Supreme Court found that Gill's counsels' performance was deficient because they had deposited in their lap Officer James' Encase computer report which contained file names on their face which should have alerted them to inappropriate sexual content. *Gill v. State*, 300 S.W.3d at 233. Furthermore, counsels' performance was deficient because they took no action to interview or depose Officer James, the officer in charge of the investigation of Lape's death, despite Missouri cases which had imposed a duty on counsel to interview or depose investigating officers. *See Clay v. State*, 954 S.W.2d 344, 347-49 (Mo. App., E.D. 1997) (counsel ineffective for failing to interview or depose investigating police officers noting: "[a] prudent lawyer defending a first degree murder charge would be expected to interview the investigating officers"); *Gennetten v. State*, 96 S.W.3d 143, 152 (Mo. App., W.D. 2003) (counsel was

ineffective for failing to investigate a witness and quoting *Clay* for counsel's duty to interview police officers who investigated the defendant). Counsels' failure to interview or depose Officer James stands in stark contrast to the statement Kenyon made to an occurrence witness in Gill's case while deposing a witness who owned lakehouse property with Lape that he "like[s] to take depositions of anybody that has **any kind of familiarity** with the case **at all**...." (29.15L.F.403 transcript at p.4) (emphasis added).

The Missouri Supreme Court had the authority to decide the admissibility of evidence of Lape's character and it decided that evidence was admissible. *See Booth, Payne, and Simmons v. South Carolina*. Further, the Missouri Supreme Court found that if counsel had done what the co-defendant's counsel had done to uncover Lape's computer's contents, they could have used it to dissuade the state from misrepresenting Lape as a person of stellar character and morals or if the state had insisted on misrepresenting Lape's character, then counsel was entitled to rebut that misrepresentation with Lape's computer's contents. *Gill v. State*, 300 S.W.3d at 234.

II. Gill's Case is Controlled By this Court's *Rompilla* Decision Because Counsel Committed A Similar Omission

The *Gill* decision involves nothing more than a straightforward application of *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla v. Beard*, 545 U.S. 374, 383 (2005), this Court found counsel's performance in that death penalty case was

deficient when counsel failed to examine a court file that contained Rompilla's prior conviction. Counsel's performance was deficient because they were on notice that the government intended to utilize as aggravating evidence Rompilla's violent offense history. *Id.* at 383-84. That prior conviction file contained evidence that would have responded to and rebutted the government's aggravation. *Id.* at 385-86. This Court noted that counsel's performance was deficient because of the ease with which counsel could have examined the court file. *Id.* at 386 n.4. This Court further noted that counsel's obligation to rebut the aggravating evidence went beyond just having objected to the government being allowed to admit the evidence on grounds that it was prejudicial. *Id.* at 386 n.5.

Here counsel had James' Encase report and ignored the obvious – file names that would have put any reasonably competent attorney on notice that Lape's computer contained inappropriate sexual content. As experienced capital counsel, they knew that the state would present victim impact evidence yet they took no action to follow-up the Encase report for evidence that could reasonably be anticipated to rebut that victim impact. *Cf.* Rompilla.

Petitioner complains that counsel could not be ineffective because Gill's counsel objected to its victim impact evidence (Petition at 11). As this Court recognized in *Rompilla*, counsel's obligation goes beyond merely objecting to the state's evidence and includes uncovering evidence that rebuts aggravating evidence. *Rompilla*, 545 U.S. at 386.

Petitioner also complains that counsel could not be ineffective because Gill did not tell counsel about Lape's computer's sexual content (Petition at 3). This Court in *Rompilla* rejected the notion that counsel could forgo examining the court file and instead rely on the defendant or the defendant's family for determining whether there was anything helpful in the court file. *Rompilla*, 545 U.S. at 388. The same was true here, counsel had an obligation to carefully review Officer James' Encase report and to then interview or depose James.

Counsel had a duty in *Rompilla* to review the court file from the prior conviction because the prosecution had indicated that it had intended to rely on its contents. *Rompilla*, 545 U.S. at 389-90. Similarly, Gill's counsel had a duty to review the Encase report with an eye towards whether it would contain rebuttal to victim impact evidence because as experienced capital counsel they had to know the state would be presenting victim impact evidence. *See State v. Gardner, Booth, Payne, and Simmons v. South Carolina.*

The Missouri Supreme Court in evaluating Gill's counsels' performance found it particularly compelling that Gill's co-defendant's counsel, who had access to the same reports from Officer James, uncovered Lape's computer's sexual content. *Gill v. State*, 300 S.W.3d at 230-31. The co-defendant's counsels' actions of uncovering Lape's computer's sexual content is a perfect measure of Gill's counsels' unreasonableness because counsel for both defendants were similarly situated in having Officer James' reports.

Rompilla was prejudiced because had counsel looked at the prior conviction court file they would have found a range of mitigation leads that were not furnished through other sources. *Rompilla*, 545 U.S. at 390. Once counsel had the obligation to examine the court file, they could not ignore "red flags" that would have led to favorable matters. *Id.* at 391 n.8. In Gill's case, the "red flags" the Missouri Supreme Court recognized were file names in James' Encase report such as "a_slutty18girl_w38c," "daddoesme15," "lilnichole14," "sweet_ tasting_slute," "sweetgirl4older," "sweetpiece123." *Gill v. State*, 300 S.W.3d at 228.

Justice O'Connor, in her *Rompilla* concurrence, noted that counsel's failure to review the court file was the result of inattention and not a reasoned strategic judgment. *Rompilla*, 545 U.S. at 395-96 (O'Connor, J. concurring and relying on *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). Counsel's deficient performance here is even more egregious than what Justice O'Connor recognized was the case in *Rompilla*. Gill's counsel had Officer James' report with its sexually suggestive file names, but did nothing to follow-up on that information through either interviewing or deposing James. *Gill v. State*, 300 S.W.3d at 233.

The mitigation case in *Rompilla* that could have been built through examining the court file and following-up on the "red flags" established Rompilla was prejudiced. *Rompilla*, 545 U.S. at 391-93. Here, Prosecutor Swingle testified that he did not present any victim impact evidence in the co-defendant's trial that

would have opened the door to Lape's computer's sexual contents (29.15Ex.95 at 46-47). The reason Swingle did not was that the co-defendant's counsel, unlike Gill's counsel, had uncovered Lape's computer's sexual contents and the trial court had ruled that if Swingle cast Lape as "a saint," then Lape's computer's sexual content was admissible (29.15Ex.95 at 46-52, 68). The Missouri Supreme Court properly reasoned that Gill was prejudiced because the co-defendant getting life when the prosecutor refrained from injecting evidence Lape was a person of impeccable character established a reasonable probability of a different result. *Gill v. State*, 300 S.W.3d at 230-31, 234. The Missouri Supreme Court further found that Brown's life sentence could not be attributed to different factual scenarios because both Brown and Gill alleged the other shot Lape. *Gill v. State*, 300 S.W.3d at 231 n.4.

In a like manner to *Rompilla*, the Missouri Supreme Court found that Gill was prejudiced through counsels' failure to do the obvious. Gill was prejudiced because Lape's computer's contents either could have been used to rebut the state's good character evidence or could have been used to dissuade the state from presenting the good character evidence. *Id.* at 234. Prejudiced was also established because co-defendant Brown's counsel had access to the same information as Gill's counsel, but Brown's counsel uncovered the computer's sexual content and used that knowledge to prevent the state from presenting good

character evidence about Lape and Brown was sentenced to life. *Id.* at 230-31, 234.

The petitioner, as it did in the Missouri Supreme Court, seeks to mislead this Court by presenting only an out of context snippet of Kenyon's testimony that he is vigilant about not wanting to be perceived as "kicking a corpse." (Petition at 15). Petitioner does this in order to obfuscate the truth to claim counsel exercised reasonable strategy (Petition at 15). The Missouri Supreme Court declined to sanction such attempt and this Court should too. Kenyon's "kicking a corpse testimony" in context was as follows:

> Q. And when did you have -- so you reviewed this in a month. Had you known about this at the time of trial, how would you have used it?
>
> A. We would have alerted -- it's difficult to know exactly how it would have been used in trial, because we are in a precarious position as defense attorneys in this case because there's an expression which seems like a callous expression, but it's very true and we use it in our trade, which is you don't kick a corpse. In penalty phase, you don't try and slam a victim by showing bad things that the victim may have done. That generally doesn't go over well with juries.[3]

---

[3] Petitioner only quotes Kenyon to this point and fails to reproduce the balance of Kenyon's testimony that immediately followed. *See* Petition Appendix at A-19.

Q. All right.

A. So you have to be very careful about introducing anything that in any way demeans or disrespects the memory of the person who was the deceased. But on the other hand, having that information in your hand, you can utilize it as a bargaining chip, if nothing more, with the prosecuting attorney's office letting them know that should you attempt to try and paint a picture of the victim as being an angel, it is important that the jury does get the whole picture. And so it would probably have been something -- I don't suspect it would have been something that I would have made any effort to try and introduce in the defendant's case in chief in the penalty phase. But it certainly would have been something that I would have strongly considered using in rebuttal or even for cross examination purposes of State's witnesses to the extent that they would adduce evidence that the victim was a saint.

Q. Do you think that Mr. Lape was painted as a saint in your case?

A. Yes.

Q. So from what you're saying is if you had this information and he was painted as a saint, would you have used it?

A. Yes.

(29.15Tr.172-73). Thus, Kenyon indicated without reservation that had he known of Lape's computer's sexual contents that he would have used it to rebut

respondent's evidence or to prevent respondent from misrepresenting Lape as a person of exceptional integrity. Turlington, likewise, testified Lape's computer's sexual content could have been used to rebut the state's portrayal of Lape as an exemplary father and person of the highest moral character (29.15Tr. 307-08).

The Missouri Supreme Court's finding of deficient performance in the handling of Officer James' computer police report and failure to interview or depose Officer James is consistent with what other courts have ruled when counsel who had police reports failed to take reasonable actions based on the contents of those reports. When counsel obtains a police report, counsel is required to utilize the information contained in that report in order to conduct reasonable investigation intended to further the client's defense and the failure to do so constitutes deficient performance. *See, e.g., Pillette v. Berghuis*, 630 F.Supp.2d 791, 801 (E.D. Mich. 2009) (failure to utilize police report to corroborate defendant's testimony was deficient performance and prejudicial); *In re Cordero*, 756 P.2d 1370, 1382-83, 1386 (Ca. banc 1988) (failure to investigate evidence of defendant's PCP use recounted in police report was deficient performance and prejudicial as to intoxication defense); *Commonwealth v. Phinney*, 843 N.E.2d 1024, 1028-31, 1033 (Ma. 2006) (failure to utilize police reports that identified someone else as homicide suspect deficient performance and prejudicial); *Espinal v Bennett*, 588 F.Supp.2d 388, 399-408 (E.D.N.Y. 2008) (failure to investigate information in redacted police report that would have corroborated defendant's

alibi defense was deficient performance and prejudicial); *Garay v. State*, 53 P.3d 626, 626-29 (Alaska Ct. App. 2002) (counsel's failure to conscientiously review police report and take appropriate action required vacating guilty plea); *Washington v. Smith*, 219 F.3d 620, 625-26, 629, 634 (7th Cir. 2000) (counsel who failed to decipher handwriting in police report regarding matters that would have led to critical evidence supporting alibi defense and lack of defendant's connection to weapons used constituted deficient performance that was prejudicial).

Moreover, the Missouri Supreme Court's *Gill* decision is consistent with other courts' decisions finding counsel was ineffective for failing to investigate rebuttal evidence. It is generally recognized that counsel's failure to prepare evidence to rebut evidence that reasonable counsel ought to have anticipated constitutes ineffective assistance of counsel. *See, e.g., Couch v. Booker*, 650 F.Supp.2d 683, 692-95 (E.D. Mich. 2009) (counsel was ineffective for failing to investigate and obtain a pathologist who could have rebutted state's pathologist that cause of death was accident, rather than homicide and required new trial); *Thomason v. Jamrog*, 2008 W.L. 2761042 *9-*10 (E.D. Mich. July 15, 2008) (counsel's performance deficient for failing to obtain expert to rebut state's expert on memory repression theory, but defendant not prejudiced); *Millam v. State*, 745 N.W.2d 719, 721-24 (Ia. 2008) (counsel's performance deficient for failing to offer evidence in sexual abuse trial to rebut alleged victim's testimony that she had made prior false accusations of sexual abuse and new trial required). *Cf. Taylor v.*

State, 262 S.W.3d 231, 237-48 (Mo. banc 2008) (defendant was prejudiced by absence of evidence that could have been used to contradict state's witness).

Under this Court's decisions in *Booth, Payne, and Simmons v. South Carolina,* evidence that rebuts victim impact evidence is presumptively admissible. Under Missouri law, Lape's computer's sexual content was presumptively admissible rebuttal evidence because it counteracted, repelled, and disproved Lape was a person of exemplary moral character and a father worthy of being referred to as "Mr. Mom." *See Gardner, supra.* Thus, counsel was obligated to investigate the obvious that appeared in James' computer analysis.

In *Gill*, petitioner presented victim impact evidence that the victim was a person of sterling character of the highest moral fabric and a father of exemplary character. Counsel knew the state would be presenting victim impact and had Officer James' report which listed file names that would have alerted reasonable counsel to the sexual content on Lape's computer. Despite that knowledge and possession of Officer James' computer report, counsel did not follow Missouri law and interview and depose the police officer who had investigated the case. *See Clay* and *Gennetten*. Moreover, that Gill's counsels' performance was deficient is established because the co-defendant's counsel, who had access to James' reports, uncovered Lape's computer's contents and used that information to prevent the state from misrepresenting Lape's character to the jury. Prejudice to Gill was

demonstrated because when the state was prevented from misrepresenting Lape's character to the jury, the co-defendant obtained a life sentence.

III. There Is No Caselaw Conflict On The Presumptive Admissibility Of Rebuttal To Victim Impact Evidence

Petitioner asserts that there now is a conflict between jurisdictions as to whether counsel can be deemed ineffective for failing to discover inadmissible evidence. This Court has made clear through its decisions that rebuttal to victim impact evidence is presumptively admissible. *See Booth, Payne, and Simmons v. South Carolina.* Thus, there is no conflict to support granting the state's petition.

The cases petitioner cites have no application to the issue of the effectiveness of counsel for failing to rebut victim impact evidence. In *DeSchon v. State*, 197 P.3d 476, 481-82 (Mont. 2008), counsel was not ineffective for failing to introduce inadmissible evidence of victim bad character in the defense case in chief. In *Cummings v. Sirmons*, 506 F.3d 1211, 1232-33 (10th Cir. 2007) counsel was found not to have been ineffective for failing to impeach and cross-examine a state's witness with his prior convictions and mental health history. Neither of these cases involve counsel having failed to rebut victim impact evidence, and thus, there simply is no conflict in the law for this Court to address.

IV. LACK OF JURISDICTION

A. Necessity To Choose Between The Missouri Supreme Court's And Attorney General's Factual Findings

This Court defers to factual findings of state courts, even when the findings relate to a constitutional issue. *Hernandez v. New York*, 500 U.S. 352, 366 (1991). *See also*, *Snyder v. Louisiana*, 552 U.S. 472, 486 (2008) (Thomas, J. and Scalia, J. dissenting and citing *Hernandez* for this principle). The motivating principle behind deference to state court findings is considerations of federalism. *Sumner v. Mata*, 449 U.S. 539, 547 (1981).

In a similar vein, the Missouri Supreme Court normally defers to postconviction trial court factual findings. *State v. Taylor*, 929 S.W.2d 209, 224 (Mo. banc 1996). In order for the Missouri Supreme Court to have concluded counsel was ineffective for failing to uncover Lape had put offensive sexual content on his computer, however, it had to reject the Attorney General's factual findings, that the postconviction judge signed as the findings of a court, that Gill put the offensive content on Lape's computer, rather than Lape put it on his own computer. If this Court were to grant certiorari, then it would be placed in the untenable position of having to choose whether to defer to the Attorney General's factual finding the postconviction trial court signed that Gill was responsible for Lape's computer's sexual content or the Missouri Supreme Court's factual finding, based on Officer James' testimony, that Lape was responsible for the sexual content on his own computer. Prudential federalism considerations require this Court deny certiorari because it is not the role of this Court to decide whether

to apply the Attorney's General's rendition of "the facts" that the postconviction judge signed or the facts the Missouri Supreme Court properly found.

B. Hypothetical Facts – Petitioner Lacks Standing

This Court has recognized that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). The Article III standing requirement enforces the Constitution's case or controversy requirement. *Daimler*, 547 U.S. at 342. In *Daimler*, this Court concluded that the plaintiffs lacked standing because the alleged injury was "conjectural or hypothetical" because it depended on how legislators responded to a reduction in revenue. *Daimler*, 547 U.S. at 344.

Petitioner has argued that this Court should grant certiorari because the Missouri Supreme Court's decision mandates that capital defense counsel investigate victims' backgrounds such that a victims' families will "be harangued by zealous investigators" to uncover unfavorable material about the victims such that the *Gill* opinion "requires capital-defense counsel to drag murder victims through the mud" (Petition at 16-17). According to petitioner, the *Gill* opinion will lead to investigators interrogating the murder victims' friends and relatives about the victim's character flaws (Petition at 18).

The Missouri Supreme Court's opinion only imposed on counsel the duty to carefully examine police reports that were provided to counsel in discovery and to interview or depose police officers who investigated the defendant. The facts of this case do not involve investigators pursuing survivors to acquire bad character evidence about a victim. The horrors that petitioner posits warrant this Court's review are just as conjectural and hypothetical as the injury alleged in *Daimler*, and therefore, petitioner lacks standing here.

CONCLUSION

This Court should deny certiorari because rebuttal evidence to victim impact evidence is presumptively admissible and constitutionally required to be allowed under this Court's decisions. Gill's counsel were obligated to investigate the police computer expert, Officer James, who knew the victim's computer contained sexual content that would have rebutted petitioner's misrepresentation of the victim as a person of the highest moral character and personal integrity. Reasonable counsel who had Officer James' report would have uncovered Lape's computer's sexual content because of the file names that appeared in that report. There is no conflict between jurisdictions as to the admissibility of evidence that rebuts victim impact evidence and the effectiveness of counsel in failing to present such rebuttal.

Further, this Court should deny certiorari because it lacks jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22ND day of JUNE, 2010, two true and correct copies of the foregoing were mailed postage pre-paid to the Office of the Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

William J. Swift

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MAR 21 2013

No. 09-1327

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

MARK ANTHONY GILL,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Missouri
– Capital Case –

REPLY BRIEF

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PETITIONER'S REPLY

Petitioner has asked the Court to consider the following question:

Does a defendant's constitutional right to effective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), require capital-defense counsel to conduct a pre-trial investigation into evidence that disparages the murder victim's character, even though such character evidence is presumptively inadmissible under state law?

In his Brief in Opposition ("Opp.Br."), respondent Mark Gill ("Gill") argues that victim-impact evidence is presumptively admissible, and thus it follows that capital-defense counsel is reasonably required to investigate facts to rebut the State's victim-impact evidence. Opp.Br. at 17-19, 21-22. From this premise, Gill maintains that his case "involves nothing more than a straightforward application of *Rompilla v. Beard*, 545 U.S. 374 (2005)." Opp.Br. at 22.

But Gill's analysis sidesteps the question presented by wrongly equating "victim-impact" evidence with "victim-character" evidence. It is true that some victim-impact evidence is admissible. But the question presented asks whether trial counsel is constitutionally obligated to investigate evidence about a victim's character—evidence that is presumptively inadmissible, even when presented as part of victim-impact testimony. Until the Missouri Supreme Court announced its opinion in the present case, no court had ever, to petitioner's knowledge, deemed trial counsel ineffective for failing to gather presumptively inadmissible evidence. Therefore, this case cannot be resolved with a straightforward

application of the Court's opinion in *Rompilla*. To the contrary, the Missouri Supreme Court's holding expands the scope of capital-defense counsel's investigative duties far beyond those mandated by *Rompilla*.

I. Gill's argument ignores the presumptive inadmissibility of victim-character evidence, and thereby unjustly condemns trial counsel for failing to prepare rebuttal for inadmissible evidence that was, in hindsight, improperly admitted over counsel's objection.

Gill argues that this case is not "cert-worthy" because the Missouri Supreme Court "simply applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984)" to a unique set of facts. Opp.Br. at 16. But, as Gill's analysis reveals, the Missouri Supreme Court did not follow *Strickland* in evaluating counsel's performance in this case because the Court improperly judged counsel's actions based on whether they appeared reasonable in hindsight, rather than on whether they were reasonable in light of counsel's perspective at the time. *See Strickland*, 466 U.S. at 689-90 (requiring that counsel's actions be "viewed as of the time of counsel's conduct").

The fundamental flaw in Gill's analysis is that it assumes, wrongly, that defense counsel could not have reasonably expected that they could prevent the State from eliciting evidence about the victim's good character at trial. And based on this assumption, Gill argues that competent counsel would have looked at the pornographic files on the victim's computer and interviewed Officer James about the computer's contents in an effort to develop evidence to rebut the

positive portrayal of the victim. Opp.Br. at 16-17, 22.

But before trial, defense counsel had no reason to expect that the State would be permitted to adduce inadmissible evidence of the victim's good character. Defense counsel had decided to object to such evidence, and their decision was objectively reasonable. As the Missouri Supreme Court recognized in the present case, "Generally, neither the State nor the defense may introduce character evidence about the victim in a murder case." *Gill v. State*, 300 S.W.3d 225, 232 (Mo. banc 2009) (citing *State v. Hall*, 982 S.W.2d 675, 681 (Mo. banc 1998)). Gill argues that *Hall* stands only for the proposition that "a defendant cannot initiate injecting evidence of the victim's bad character," Opp.Br. at 18, but this argument is refuted by both *Hall* and the Missouri Supreme Court's analysis in the present case:

> If the State attempts to introduce evidence of the good character of the victim in the penalty phase, defense counsel has two options. Defense counsel may object to the introduction of the character evidence. If defense counsel chooses this option, *the trial court should sustain the objection and disallow the character evidence*. Alternatively, defense counsel may, as a strategic maneuver, choose to allow the State to present the good character evidence of the victim. By doing so, the State opens the door for the defense to present rebuttal character evidence.

Gill, 300 S.W.3d at 232-33 (emphasis added). Thus, under Missouri law, the State may not introduce evidence about the victim's character in the penalty phase if the defendant objects to it.

Gill claims that counsel was ineffective for failing to investigate the negative victim-character evidence "in a case where victim was portrayed as a 'saint,'" and he argues that if counsel had uncovered the pornography on the victim's computer, they could have "used it to dissuade the state from misrepresenting [the victim] as a person of stellar character and morals . . . ." Opp.Br. at 16, 22. Alternatively, Gill argues, counsel could have used the material to rebut the State's victim-character evidence if the State "insisted on misrepresenting [the victim's] character." Opp.Br. at 16, 22. But Gill ignores the fact that counsel had no reason to believe that the State would be allowed to present positive victim-character evidence that would necessitate rebuttal. Counsel objected to the introduction of the State's character evidence and, thus, the trial court should have sustained the objection and kept all character evidence out. *Gill*, 300 S.W.3d at 233 n.8.

It is, of course, true that the trial court overruled counsel's objection. *Gill*, 300 S.W.3d at 233 n.8. But the trial court's mistaken ruling did not retroactively render counsel's preparation incompetent.[1] Viewed from counsel's perspective at the time they were preparing their case, it was reasonable not to spend time gathering victim-character evidence that they had every reason to believe would not be admissible.

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[1] On direct appeal, Gill challenged the trial court's admission of one of the statements that he now alleges portrayed the victim as a man of "stellar character." *State v. Gill*, 167 S.W.3d 184, 195-97 (Mo. banc 2005). The Missouri Supreme Court held that even if the statement was impermissible, it was not "so unduly prejudicial as to render the trial 'fundamentally unfair.'" *Id.* at 197.

Gill's perspective, like the Missouri Supreme Court's, is distorted by hindsight. At the time counsel decided not to investigate the contents of the victim's computer, they had no reason to believe that any material thereon would be admissible. The Court should grant certiorari to clarify that the Constitution does not require capital-defense counsel to expend scarce resources developing evidence that they have no reason to believe will be admissible at trial.

II. Gill's dismissal of the conflict between jurisdictions regarding counsel's obligation to gather inadmissible evidence relies on Gill's improper generalization of "victim-character" evidence as "victim-impact" evidence.

In responding to Petitioner's argument that the Missouri Supreme Court's opinion conflicts with decisions of the Montana Supreme Court and the Tenth Circuit regarding counsel's duty to discover inadmissible evidence, Gill states simply that, "This Court has made clear through its decisions that rebuttal to victim-impact evidence is presumptively admissible." Opp.Br. at 32. But this response is a *non sequitur*. It does not matter whether or not rebuttal to victim-impact evidence is presumptively admissible. As explained above (and as noted by the Missouri Supreme Court in its opinion), victim-character evidence is generally inadmissible. By holding that Gill's trial attorneys were ineffective for failing to discover and use at trial the pornography on the victim's computer—evidence that would have been offered solely to imply that the victim had an immoral character—the Missouri Supreme Court condemned counsel for failing to discover presump-

tively inadmissible character evidence, not the sort of victim-impact evidence that is typically admissible.

The conflict identified in the Petition arises from inconsistent holdings regarding whether it is objectively unreasonable for defense counsel to decline to investigate evidence that they do not believe will be admissible at trial. The Montana Supreme Court and the Tenth Circuit have both indicated that counsel is not required by the Sixth Amendment to expend resources unearthing inadmissible evidence. *See DeSchon v. State*, 197 P.3d 476 (Mont. 2008); *Cummings v. Sirmons*, 506 F.3d 1211 (10th Cir. 2007). In the present case, the Missouri Supreme Court reached the opposite conclusion. The Court should grant Petitioner's request for certiorari to resolve the conflict.

III. A purported "straightforward" application of *Rompilla v. Beard* does not support the Missouri Supreme Court's determination that Gill's trial attorneys were ineffective.

Gill argues that the Missouri Supreme Court's holding "involves nothing more than a straightforward application of *Rompilla v. Beard*, 545 U.S. 374 (2005)." Opp.Br. at 22. But, in fact, the decision in this case imposes a much heavier burden on counsel to investigate evidence pre-trial than did this Court's decision in *Rompilla*.

Most significantly, this Court did not hold in *Rompilla* that counsel is constitutionally obligated to investigate and obtain evidence that they reasonably believe will not be relevant or admissible at trial. To the contrary, this Court held that capital-defense

counsel was ineffective for failing to "make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla*, 545 U.S. at 377, 383-87. Gill argues that his trial attorneys were "experienced capital counsel" who "had to know the state would be presenting victim impact evidence." Opp.Br. at 24. But, again, Gill confuses victim-impact evidence, which counsel could reasonably predict would be admitted, with victim-character evidence which, for the reasons outlined above, counsel could reasonably expect would not be admitted over timely objection.

As Gill observes, the Court held in *Rompilla* that defense "[c]ounsel's obligation to rebut aggravating evidence extended beyond arguing that it ought to be kept out." 545 U.S. at 386 n.5. In *Rompilla*, counsel sought to exclude evidence in support of a statutory aggravating circumstance on the ground that admission of the evidence would be "prejudicial." *Id.* at 378, 386 n.5. Under those circumstances, counsel should have anticipated that her objection would be unsuccessful. Not so here. Missouri law does not contemplate that the character of the victim may be considered by the jury as an aggravating or mitigating factor in deciding whether to impose the death penalty. *See* Mo. Rev. Stat. § 565.032 (2000). Indeed, as noted *supra*, Missouri law holds that victim-character evidence is inadmissible in a murder trial and that any objection to it should be sustained. *See Gill*, 300 S.W.3d at 232. Thus, even if capital-defense counsel is generally obligated to prepare rebuttal to statutory aggravators, it is not unreasonable for counsel to decline to develop rebuttal to evidence that the law specifically identifies as inadmissible.

By insisting that counsel acted unreasonably in declining to investigate the murder victim's character before trial, Gill invites the courts to second-guess a fundamental strategic decision by capital-defense counsel—the decision to spend (or not spend) their limited resources pursuing a particular line of evidence. Justice O'Connor, writing in concurrence in *Rompilla*, observed that counsel's behavior in that case was unreasonable, in part, because "their decision not to obtain [the defendant's] prior conviction file was not the result of an informed tactical decision about how the lawyer's time would best be spent." 545 U.S. at 395 (O'Connor, J., concurring). Gill's attorneys, on the other hand, had legitimate strategic reasons not to spend their time looking at pornography on the victim's computer or interviewing Officer James about the computer's contents. Counsel knew that the State was not planning to use any material from the computer at trial. App. at A19-A20. And, as counsel explained, they were interested in spending their time dealing with the facts that incriminated Gill, not searching for evidence that might imply that the victim had a character flaw unrelated to the murder. App. at A19-A20. Similarly, their decision not to interview Officer James was a calculated choice not to expend resources on what they believed would be a fruitless endeavor:

> [Counsel David Kenyon]: [I]t didn't appear from reviewing the discovery that [Officer James] really did much other than tell which officers to do what . . . . Had we unlimited time and resources, sure, we would have wanted to interview everybody who was even remotely affiliated with this case, but you have to prioritize.

(PCR Tr. 149). Counsel's disinterest in whether pornography was on the victim's computer made sense in light of their experience that, when conducting the penalty phase in a jury trial, it is generally bad strategy to "slam a victim by showing bad things that the victim may have done." App. at A19. Neither Gill nor the Missouri Supreme Court's opinion explain why counsel could not reasonably decide before trial that they would not spend time seeking evidence to smear the victim during the penalty phase, but would instead rely on the trial court to keep all inadmissible victim-character evidence out.

Gill accuses Petitioner of "obfuscat[ing] the truth" and seeking to "mislead this Court" by omitting from the Petition a portion of counsel's testimony. Opp.Br. at 27-28. During the post-conviction hearing, one of Gill's trial attorneys testified that, had he known that the victim had so much pornography on his computer, he would have tried to use it as a "bargaining chip" to convince the State to limit its use of victim-character evidence. Opp.Br. at 28 (citing PCR Tr. 172-73). If the prosecutor persisted, counsel testified, he would have "strongly considered" using the pornography in rebuttal. *Id.*

Petitioner did not omit this testimony "in order to obfuscate the truth." The testimony was omitted because, like Gill's own analysis, it indulges in imagining what counsel would have done in hindsight, with the benefit of knowing that the State was able to introduce positive victim-character evidence despite counsel's objections. In *Rompilla*, this Court was careful to emphasize that "hindsight" must be "discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made." 545 U.S. at 381 (citing *Strickland*, 466 U.S.

at 689). By ignoring this fundamental requirement, the Missouri Supreme Court departed from the constitutional standard for evaluating the effectiveness of counsel enunciated in *Strickland* and reaffirmed in *Rompilla*. Certiorari is necessary to ensure that the performance of capital-defense counsel, in this case and those that follow, is evaluated according to the correct constitutional standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 21, 2010